

# Mediation and Social Justice: Risks and Opportunities\*

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## I. INTRODUCTION

Since the earliest days of the “modern mediation field” in the 1970s, there has been a continuous and contentious debate regarding whether the use of mediation poses a threat to the value of justice, at both the individual and social levels.<sup>1</sup> Early supporters of the process claimed that it would expand “access to justice,” and thus provide not only administrative savings to the courts but important private benefits to disputants who might otherwise be excluded from the justice system.<sup>2</sup> Critics were not so sanguine, however. Early critics included eminent scholars like Laura Nader and Owen Fiss, who claimed that the use of mediation and other “alternative dispute resolution” (“ADR”) mechanisms would undermine the achievement of justice, by “privatizing” dispute resolution and “disaggregating” claims of collective injustice.<sup>3</sup> Indeed, the critics believed that policies favoring mediation and ADR were being put forward as intentional strategies to frustrate the justice gains that had begun to accumulate through legal and legislative action in the 1960s. Progressive advocacy and lobbying had begun to bring greater justice to racial minorities, women, consumers, poor people, and other groups of “have-nots.” Increased use of mediation for disputes involving such parties, in the critical view, constituted a covert way of reversing those gains,

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<sup>1</sup> See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 709–11 (2008). See also JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT, & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 2–11 (2d ed., 2006) [hereinafter ALFINI].

<sup>2</sup> See LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 5–6 (1990).

<sup>3</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1007–08 (1979); see also Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671–72, 675–82 (1986).

channeling claims that might succeed under new progressive legal doctrines into informal, extralegal processes where those doctrines held no sway.<sup>4</sup>

Despite the trenchant criticism, the use of mediation has continued to expand through the last four decades, gradually replacing other ADR processes like arbitration as the most favored method of nonjudicial dispute resolution, both for courts and similar public agencies, and for private disputants, both individual and corporate. Across the United States, the state and federal courts recommend and even compel the use of mediation, businesses increasingly choose to use it in both internal and external conflicts, and private citizens are encouraged to use mediation by their own lawyers and by public education campaigns.<sup>5</sup> However, the concern that this widespread use of mediation could be inimical to social justice has never abated. Indeed, in recent years, the mediation field itself has seen several efforts to launch self-critical inquiries on the subject.<sup>6</sup> The starting point for these inquiries is the assumption that preserving and improving social justice matters, in mediation as in our other social institutions; and the aim is to show how the use of mediation, with the adoption of appropriate “best practices,” can serve to advance rather than retard progress toward social justice. That is, mediation supporters have agreed that social justice is a critical goal of dispute resolution, but they have sought, in a variety of ways, to show that use of the process can be supportive and not destructive of that goal.<sup>7</sup>

This article presents both a review and a critique of the standard arguments offered to reconcile the use of mediation with the goal of improving social justice, and shows that none of those arguments ultimately succeeds. The article then offers a novel perspective on the conflict between mediation and social justice, arguing that the use of mediation can indeed be compatible with pursuit of social justice, depending on the specific kinds of practices mediators employ. Part II reviews the “social justice critique” of mediation and its bases, including early and more recent accounts. Part III describes the variety of responses that mediation’s proponents have offered

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<sup>4</sup> See Edwards, *supra* note 3, at 676–80; Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1148–57 (2009) (discussing Fiss’s view that the rise of interest in ADR was part of an intentional political drive to reverse the movement in the 1960s toward a “social welfare state” and redistributive policies, and move back to a “night watchman state” and neoliberal free-market policies).

<sup>5</sup> See Bush, *supra* note 1, at 732–35.

<sup>6</sup> See *infra* note 33 and accompanying text.

<sup>7</sup> See *infra* notes 34–71 and accompanying text.

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to counter its social justice critics. Part IV presents an account of the flaws in the arguments used to counter the critics. Part V offers a new view of how mediation can be supportive of, or at least not inimical to, social justice, and explains the conditions necessary for mediation to meet that goal.

### II. THE SOCIAL JUSTICE CRITIQUE

The criticism of mediation as inimical to the achievement of justice has taken two major forms, although both point to similar elements of the process as problematic. The first type of critique focuses on the “individuating” nature of the mediation process, in which every case is handled on its own unique terms. The second type of critique focuses on the informality of the process, both procedurally and substantively, and the absence of formal rules and outside scrutiny. This part of the article reviews both types of critique. However, it is first useful to define the term “social justice” as generally used in the discussion of the issues explored here.

#### A. *Social Justice: A Working Definition*

Like other terms that refer to important societal goals or values, the term “social justice” can be understood in different ways. However, for purposes of this article, it is important to use a definition that reflects the way the term has been used in the literature on mediation and dispute resolution. In that literature, social justice is generally used to refer to a state of affairs in which inequalities of wealth, power, access, and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased.<sup>8</sup> Social justice, in short, means achieving relative equality of conditions (not just opportunities) as between all groups or classes within the society. Since the absence of such equality often results from social and organizational structures or systems—such as educational systems, housing markets, employment markets, etc.—rather than individual behavior, social justice is understood as the absence of structural injustice or inequality. Wherever such systems effectuate or perpetuate inequalities between groups delineated along lines of wealth, race, religion, ethnicity, gender, or the like, the resulting inequality represents social injustice. Wherever measures are

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<sup>8</sup> See, e.g., Leah Wing et al., *Framing the Dialogue: Social Justice and Conflict Intervention*, 7 (4) ACResolution 3 (Summer 2008); Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 911 (1984).

taken to alleviate that inequality, and those measures are successful, social justice is advanced.

Sometimes injustice done separately to individuals can cumulate, especially where the individuals belong to a certain group, to produce social injustice. In this sense, social justice can be understood to encompass two “levels” at which equality among groups can be affected, for better or worse—the micro and macro levels. Ultimately, the social justice goal aims for equality at the macro level. But micro-level effects on justice for individuals, especially if they are recurrent and systematic, can also produce macro-level changes in social justice.<sup>9</sup> Thus, while social justice generally means equality between groups, and justice at the aggregate level, justice done between individuals in particular cases can also contribute to social justice. This article assumes that both micro-level and macro-level effects contribute to overall social justice, and both kinds of effects are considered below.

It is obvious that social justice can be improved, or worsened, by many kinds of policy choices and actions: redistributive measures, legislative enactments, changes in legal doctrine, or shifts in political power. It can also be affected, for better or worse, by choices among different dispute resolution processes.<sup>10</sup> Of course, there are many other social goals affected by processes of dispute resolution, and trade-offs between social goals, including the goal of social justice, are common. However, social justice, as defined here, is almost always seen as an important consideration in the dispute resolution literature. It is the debate about how this goal is affected by the widespread use of one ADR process—mediation—that is the subject of this article.

### *B. Every Case on its Own Terms: A Strength or a Weakness?*

For proponents of mediation, one of the great virtues of the process is its treatment of each case on its own terms, so that the unique features of the disputants’ problem can be addressed with a unique solution. Not having to resolve a specific dispute by reference to a general rule frees the parties to

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<sup>9</sup> See Bush, *supra* note 8, at 911–14. Although discussions of the subject confuse the two levels, or refer to them interchangeably, distinguishing them is helpful in analyzing the impacts of mediation on each level.

<sup>10</sup> See *id.*; Cohen, *supra* note 4, at 1148–51.

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generate creative solutions “tailored” to their precise situation.<sup>11</sup> However, while this individualizing feature of the process might be an unqualified good for some kinds of parties, the critics have argued that, where one of those parties is from a disadvantaged group, the solution reached in mediation might be unjust rather than creative.<sup>12</sup> And more importantly, even achievement of a just solution will never have broader effects reaching beyond the individual case—precisely the kinds of effects needed to improve social justice. Rather than aggregating justice gains, mediation “privatizes” justice.<sup>13</sup>

Consider a precedent-setting judicial decision like that of *Brown v. Board of Education*,<sup>14</sup> where tens of thousands of schoolchildren’s access to a better education resulted from the decision of a single case in court. Compared to that kind of wide-reaching aggregate impact, mediation could never have more than minimal effects, if any, on problems of structural injustice. And situations of structural injustice, in the view of mediation’s critics, are the greatest source of aggregate social inequality in access to resources, services, power, and the like.<sup>15</sup> Therefore, when whole groups of cases are referred or “channeled” to mediation, and the parties to those cases are from groups of significantly different power and status, there is simply no chance that the resolutions of those cases will have positive aggregate impacts on societal inequality, even if the outcome is favorable to the party of lesser power. No equality-promoting rules are applied in these mediations—and even more important, no such rules are created. All the impact on fairness or justice is private rather than public, particular rather than aggregate. The “privatization” critique of mediation focuses, in short, on

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<sup>11</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 9–11 (2d ed. 2005) (summarizing this view of mediation’s benefits and identifying sources supporting it); see also Anne Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 5–10 (Jay Folberg & Anne Milne eds., 1988) [hereinafter *DIVORCE MEDIATION*]; Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 268 (1989).

<sup>12</sup> See, e.g., Roman Tomasic, *Mediation as an Alternative to Adjudication, Rhetoric and Reality in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 215, 222–27, 242–48 (Roman Tomasic & Malcolm M. Feeley, eds., 1982) [hereinafter *NEIGHBORHOOD JUSTICE*].

<sup>13</sup> See Edwards, *supra* note 3; Cohen, *supra* note 4, at 1153–57.

<sup>14</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>15</sup> See Wing et al., *supra* note 8; Fiss, *supra* note 3; E. Franklin Dukes, *Righting “Unrightable Wrongs,”* 7 (4) ACResolution 15 (Summer 2008).

mediation's incapacity for furthering social justice at the macro level, as well as its diversion of attention from processes that do have capacity for macro-level social justice improvements.

Critics like Owen Fiss, Laura Nader, and others saw this disaggregating or privatizing effect of mediation (and similar processes) as an evil, in social justice terms.<sup>16</sup> Indeed, both saw the growing support for mediation as a kind of cynical ploy, designed to shift into a disaggregating forum the very kinds of cases likely to benefit from judicial resolution, given the progressive trends in legal doctrine that had emerged in the 1960s and 1970s. Instead of providing tenants, consumers, and victims of race and gender discrimination with increased access to the courts, where they could benefit from emerging protections and generate still further protective rules, there was a move to push these kinds of parties into a forum that would treat every case individually and uniquely—and rob it of its potential to benefit from or contribute to social justice in the aggregate.<sup>17</sup> For Nader, ADR mechanisms were tantamount to a “con game”, where parties were “nickel-and-dimed” into deals that gave away hard won rights for themselves and others.<sup>18</sup> For others, mediation was a kind of black hole, where the resolution of individual cases on their own terms produced a “loss of law” that inevitably worked against the expansion of social justice through law, a progressive social phenomenon that had developed for two decades since *Brown v. Board of Education*.<sup>19</sup> For these and other critics, the “unique, creative solutions” offered by mediation were a very bad bargain indeed, in which the ultimate victim was social justice.<sup>20</sup>

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<sup>16</sup> See Fiss, *supra* note 3, at 1085–90; Nader, *supra* note 3, at 1015–19; Edwards, *supra* note 3, at 679–80.

<sup>17</sup> See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 60–62 (1995) (discussing this view of ADR among both minority and feminist critics and identifying specific examples of such critics); see also Cohen, *supra* note 4 (offering a reading of Fiss's critique of ADR that places it in this larger political context).

<sup>18</sup> Nader, *supra* note 3, at 1012–15.

<sup>19</sup> See, e.g., Richard Hofrichter, *Neighborhood Justice Centers Raise Basic Questions*, in NEIGHBORHOOD JUSTICE, *supra* note 12, at 193, 195–97; see also Edwards, *supra* note 3, at 679.

<sup>20</sup> See, e.g., Richard Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE, VOL. 1: THE AMERICAN EXPERIENCE 267, 277–80 (Richard Abel, ed., 1982); Cohen, *supra* note 4, at 1153–54.

*C. Informalism: Opportunity or Danger?*

Another strand of the social justice critique looked at how individual cases were actually handled in the mediation process, rather than at how groups of cases were “channeled” to it. The main flaw in mediation for these critics was, again, a feature seen as a virtue by mediation’s proponents—its informalism. Mediation offered the opportunity for parties to engage in informal discussions, guided by skilled facilitators, and to address their problems by reference to their own needs and interests, rather than by reference to formal legal rules. This informality was indeed the feature that made possible mediation’s main benefit—the production of mutually beneficial resolutions of problems on the parties’ own terms. It also had secondary benefits, such as savings in time and costs, as well as the avoidance of fault-finding and win-lose outcomes that could increase rather than reduce antagonism, so that mediation could support improvement in relationships moving forward.<sup>21</sup> All these benefits depended on mediation’s informal character: its lack of both procedural and substantive rules.<sup>22</sup>

However, the critics once again saw a vice rather than a virtue. For early critics like Richard Abel and Roman Tomasic,<sup>23</sup> the lack of formal rules in mediation meant that mediators themselves could easily steer and pressure parties into agreements that were actually unfair to them—whether or not the mediators had intended that unfairness. The mandate to achieve agreements inevitably led mediators to use strategies, which they were explicitly trained to employ, that could easily ignore fairness concerns in the pursuit of a settlement *per se*.<sup>24</sup> Moreover, since mediators tended to be “haves”

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<sup>21</sup> See BUSH & FOLGER, *supra* note 11, at 9–11 (summarizing this view of mediation’s benefits and identifying sources supporting it).

<sup>22</sup> See *id.*

<sup>23</sup> See Abel, *supra* note 20; Tomasic, *supra* note 12, at 225–28; see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (1985) (summarizing what the authors call the “left critique” of ADR, which includes both the privatization and informalism themes).

<sup>24</sup> See William L.F. Felstiner & Lynne A. Williams, *Community Mediation in Dorchester, Massachusetts*, in NEIGHBORHOOD JUSTICE, *supra* note 12, at 111, 117–18; see also Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 31, 44 (1989) [hereinafter MEDIATION RESEARCH]; Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Process and Outcomes*, in MEDIATION RESEARCH, *supra*, at 53, 60–65; Dean

themselves—educated, middle-class, non-minority individuals—they could lack sensitivity to the unfairness that a “have-not” party might suffer in accepting a settlement induced by the mediator’s efforts.<sup>25</sup> At best, mediators could be insensitive to injustice; at worst, they could be actually biased because of their class or group identity. And since mediation was entirely private, and the actions of mediators were rarely scrutinized, the unfairness would go unnoticed and unchecked. Note that the fear of the “informalism” critics was different from that of the privatization critics: the latter were concerned about the loss of potential gains in “class” justice, while the former were concerned about the injustice done to specific parties in individual cases, as a result of the lack of formal rules and procedures. In effect, the informalism critics argued that mediation’s tendency to permit or cause injustice at the micro level could result, cumulatively, in macro-level social justice losses.

A second wave of informalism critics actually connected the concern for micro- and macro-level social justice. Beginning in the 1980s, critics began to argue that the discretion and power placed in the mediator’s hands, given the informalism of the process, was likely to work *systematically* against parties from minority and other have-not groups. Richard Delgado’s work, for example, implied the view that mediators, although theoretically mere facilitators, actually function like decisionmakers who can be affected by class biases.<sup>26</sup> In fact, mediators can strongly influence and even control the decisions made in mediation, by their interventions in the informal process, and studies of mediator interventions have provided strong evidence for the prevalence and impact of the kind of mediator influence and control that Delgado implies.<sup>27</sup> Given the influence over outcome that they exercise, it is argued, mediators’ class biases probably affect mediation outcomes, and the effect is probably to the disadvantage of parties from minority groups, especially racial minorities.

Other critics have made similar claims about injustice done to women in mediation, due to the operation in this supposedly informal process of “unwritten rules” that consistently disfavor women and lead to unfair outcomes. In a powerful and controversial article, Trina Grillo argued that

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G. Pruitt et al., *Process of Mediation in Dispute Settlement Centers*, in *MEDIATION RESEARCH*, *supra*, at 368, 374–76.

<sup>25</sup> See *infra* notes 83–85 and accompanying text.

<sup>26</sup> See Delgado et al., *supra* note 23, at 1388–89; see also Gunning, *supra* note 17, at 60–62.

<sup>27</sup> See Bush, *supra* note 1, at 727–30 (citing numerous studies documenting mediator influence over settlement terms).



rules requiring “rationality,” “reasonableness,” and “prospectivity” are generally part of the unwritten strictures that mediators impose on the discussions, and that all of these rules make it harder for women to assert their needs in mediation successfully.<sup>28</sup> Other feminist critics have agreed with and elaborated on Grillo’s argument that women are exposed to injustice in mediation.<sup>29</sup> So, if women and minorities are regularly exposed to unfairness in individual mediations, the overall impact is injustice on a class basis—social injustice at the macro level. Delgado and his colleagues go so far as to suggest that anyone advising minorities about mediation should warn them off from participating in the process, at least with a stronger party, since it is unsafe for parties of lesser power.<sup>30</sup>

Thus, the informalism critique also argues that the widespread use of mediation compromises social justice, by regularly permitting micro-level injustices that add up to macro-level social injustice. Only if the process is limited to parties of equal status, power, and group identity, can mediation be used “safely,” without posing a threat to social justice. Of course, such a limitation would vastly reduce the utilization of the process, since it is widely used in cases of divorce, employment discrimination, landlord-tenant conflict, consumer disputes, parent/child conflicts, and many others where the parties are of different and unequal status and power.<sup>31</sup>

## D. *The Critique Continues*

Recognizing the validity of the social justice critique regarding the negative impacts of mediation as to both privatization and informalism would require severely cutting back on the utilization of the process. This, indeed, has been a primary aim of the critique.<sup>32</sup> Nor has that critique abated in the two decades since the early critics first voiced their concerns: others have echoed those concerns on a regular basis and continue to do so, on

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<sup>28</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555–75 (1991).

<sup>29</sup> See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CAN. J. WOMEN & L. 134 (1989); Laurie Woods, *Mediation: A Backlash to Women’s Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985); see also Gunning, *supra* note 17, at 60–62 (summarizing the feminist critique and identifying specific feminist critics).

<sup>30</sup> Delgado et al., *supra* note 23, at 1402–04.

<sup>31</sup> See, e.g., SINGER, *supra* note 2, at 5–18; ALFINI, *supra* note 1, at 8–22.

<sup>32</sup> See *supra* notes 11–31 and accompanying text.

much the same terms as those put forward in the early critiques.<sup>33</sup> Hence the tension between mediation's proponents and social justice critics continues in force.

### III. THE "BEST PRACTICES" DEFENSE OF MEDIATION

Mediation's proponents have certainly not dismissed the concerns discussed above regarding how social justice is affected by use of the process, whether at the micro or macro level. But neither have they surrendered the field to the critics. Rather, they have argued in several ways that the critique is overstated, and that while mediation poses some risks to social justice, those risks are minimal so long as the process is guided by skilled professionals using "best practices." This part describes a number of different strands of this argument, some interrelated and some independent.

#### A. The Mediator's "Accountability" for Substantive Fairness

In the earliest years of the modern mediation field, practitioners made no particular claim that mediated agreements were substantively fair by some objective standard. The mediator's duty of impartiality applied to the conduct of the process itself, but the only guarantee regarding outcome was that any agreement would be "mutually acceptable" to the parties.<sup>34</sup> Whether the agreement was substantively fair enough to accept was up to the parties themselves; the mediator had no role in guaranteeing that fairness.

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<sup>33</sup> See, e.g., Gunning, *supra* note 17; Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87 (2004); James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminant on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65 (2004); Richard Delgado, *Alternative Dispute Resolution—Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1996–1997); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473 (2003–2004); Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321, 342–45 (2006–2007) (summarizing the critique as offered by many scholars since Fiss's original critique).

<sup>34</sup> Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88–91 (1981). Stulberg's theory is cast entirely in terms of fostering an agreement, without regard to the terms of that agreement, which are entirely in the parties' hands.

Soon, however, a clear difference of approach emerged between those who felt the mediator bore no responsibility for fairness of outcome and those who felt, to the contrary, that the mediator was indeed “accountable” for a fair and just outcome, not just a mutually acceptable agreement. That difference of opinion first crystallized in an exchange between two major figures in the field’s development, both still very influential today—Lawrence Susskind and Joseph Stulberg. Susskind argued that mediators could not ignore the potential for parties to make unwise decisions and therefore agree to unfair deals, and he suggested that the mediator was accountable to intervene in ways that reduced that risk of unfairness.<sup>35</sup> Susskind’s argument was specifically addressed to mediators of environmental and other public policy disputes, and he was specifically concerned with impacts on unrepresented and likely disadvantaged groups; he was very much addressing the concern for social justice at the macro level, as defined earlier.<sup>36</sup> Stulberg countered that, whether in policy disputes or any others, substantive intervention to ensure a fair agreement would contradict the mediator’s duty of impartiality, and even worse, compromise his or her ability to serve the central function of facilitating a mutually acceptable agreement between the parties.<sup>37</sup> Even with this sharp difference of views, there was an implicit agreement that mediators *could* shape their interventions to avoid unjust results, even if there was disagreement on whether they *should* do so.

Over time, the dominant view in the field has moved in the direction of Susskind’s “accountability” view of best practices in mediation—that substantive fairness of outcome is indeed one of the mediator’s key responsibilities. That movement was probably influenced in part by the emergence of the social justice critique itself. That is, given the sensitivity of many in the mediation field to social justice concerns, the critique hit home, and resulted in placing greater attention on how mediators could intervene to

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<sup>35</sup> Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 13–18 (1981). Susskind argues that “the success of a mediation effort must also be judged in terms of the fairness . . . of the agreements that are reached” and that mediators must strive “to achieve just and stable agreements . . .” *Id.* at 14.

<sup>36</sup> See *id.* at 1–8, 13–18.

<sup>37</sup> Stulberg, *supra* note 34, at 86–87, 96–97, 110–17. Stulberg’s argument against the “accountability” view suggested by Susskind is based primarily on his analysis of how such “non-neutrality” would make it impossible for the mediator to discharge his or her primary functions of helping the parties achieve an agreement of any kind.

“level the playing field” where needed.<sup>38</sup> The trend toward “mediator accountability” was also probably influenced by a recasting of the original conception of mediation’s aims, away from the view that the aim is to achieve settlement *per se*, and toward the view that the aim is to achieve a “win-win” agreement that *meets all parties’ needs* to the greatest extent.<sup>39</sup> Supported by scholars like Leonard Riskin, this developed into what is now called the “facilitative,” or “problem-solving” approach to mediation.<sup>40</sup> Some mediators today identify their approach as facilitative but still disclaim accountability for fair outcomes, taking Stulberg’s original view. However, as the approach is generally understood and practiced by most mediators today, facilitative mediation incorporates the view that the mediator is accountable for outcome fairness.<sup>41</sup> Thus, while based on independent theoretical roots,

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<sup>38</sup> See, e.g., Gunning, *supra* note 33, at 87–90; Coben, *supra* note 33, at 73–77; Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2002) (expressing the concerns of these authors, all of them mediation proponents, for issues of social justice and how to address them in mediation).

<sup>39</sup> LEONARD RISKIN ET. AL, DISPUTE RESOLUTION AND LAWYERS 334–48 (3d Ed. 2005) (“[The] goal is to reach an agreement that satisfies the parties’ underlying interests, that is fair to the parties, and that is not unfair to affected third parties.”). This definition is precisely the one that was argued for by Susskind in 1981. This refined conception of mediation’s goal owed much to the theory of “principled” negotiation popularized by Roger Fisher and William Ury in their classic work, *Getting to Yes*. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, 73, 83 (1981). The concept of integrative bargaining at the heart of Fisher and Ury’s work had been developed much earlier in the industrial relations field by Walton and McKersie, see RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965), but *Getting to Yes* gave this concept wide exposure in the emerging conflict resolution field. See also RISKIN ET AL., *supra*, at 165, 167–73, 190–210. Fisher and Ury argued that, rather than simply negotiating a deal in which one party might win at the expense of the other, parties should always strive to find a deal that meets the needs and interests of both. Since many had always seen mediation as a form of “assisted negotiation,” the new vision of negotiation was logically imported into the mediation field.

<sup>40</sup> See, e.g., RISKIN ET AL., *supra* note 39, at 288–300; ALFINI, *supra* note 1, at 107, 140; Bush, *supra* note 1, at 720–24.

<sup>41</sup> See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996); ALFINI, *supra* note 1, at 107, 140. See also Bush, *supra* note 1, at 720–24 (summarizing an extensive literature on mediation as a process focused on facilitating problem solving and attaining win-win agreements). Interestingly, as the field has accepted this view, even Stulberg has shifted somewhat. See ALFINI, *supra* note 1, at 129 (“If the mediator helps the parties ... to identify their interests (not just their positions) and think creatively, they may be able

the rationale for facilitative mediation practices has become strongly related to concerns for micro-level social justice.

For a facilitative mediator, the aim is not simply an agreement, but an agreement that accounts for the needs and interests of all concerned.<sup>42</sup> Such an agreement must obviously be one that avoids unfairness in the substance of the deal, and it is therefore part of the mediator's job to monitor for and ensure such fairness, through a variety of methods. While not all authorities agree on which methods to use, some of those suggested include: encouraging or steering the parties, through questions or otherwise, to consider the fairness/justice dimensions of issues being discussed or solutions being proposed<sup>43</sup>; advising parties who lack relevant information, regarding legal rights or otherwise, to obtain that information before reaching any agreement (and even providing them with information within the mediator's knowledge)<sup>44</sup>; openly discussing the importance of (and asking parties to commit to) achieving just outcomes, in mediators' opening statements on the aims of the process<sup>45</sup>; and directly suggesting or supporting specific proposals aimed at creating a fair outcome<sup>46</sup>.

Other methods of ensuring just outcomes will be discussed in the next section, but the foregoing examples reflect the predominant view in the field today that best practices in facilitative mediation, which is the standard approach used by practitioners today, include having the mediator watch out for potential substantive unfairness—micro-level injustice—and intervene to

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to identify issues in which they can both achieve the 'win-win' solution that they want." In other writings, however, Stulberg seems to remain committed to the view that achieving an agreement acceptable to the parties is the mediator's only legitimate concern. See *infra* note 89.

<sup>42</sup> See *supra* notes 39 & 41; JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984). Folberg and Taylor state generally, "The most useful way to look at mediation is to see it as a goal-directed, problem-solving intervention." *Id.* at 8.

<sup>43</sup> See, e.g., Coben *supra* note 33, at 84–85; Hyman & Love, *supra* note 38, at 180–82.

<sup>44</sup> See, e.g., Hyman & Love, *supra* note 38, at 185–86; Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L.Q. 47, 92–96 (1996); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 732–42 (1997).

<sup>45</sup> See, e.g., Gunning, *supra* note 33, at 91–92.

<sup>46</sup> See, e.g., Waldman, *supra* note 44, at 742–56; Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 459, 471–74 (D.M. Kolb & K. Kressel, eds., 1994) [hereinafter *WHEN TALK WORKS*].

prevent it. In effect, the move toward mediator accountability for outcome fairness in facilitative mediation represents a type of “reform” of the process in order to ensure greater protection of weaker parties, who might otherwise be disadvantaged in mediation. This kind of reform effort has also surfaced in other areas in the ADR field, driven by similar concerns for social justice.<sup>47</sup>

The principle of mediator accountability for substantive fairness—micro-level social justice—is also evident in mediator ethical standards and mediator competency tests. For example, before certifying a mediator as competent (after a live performance evaluation), one test asks whether the mediator “[a]ssisted in developing [an] agreement that is balanced, fair, realistic.”<sup>48</sup> Another asks whether the mediator “aims for clear, practical, legal agreements,” and “emphasizes a forward-looking, problem-solving approach.”<sup>49</sup> In both cases, the substantive quality of the agreement, including its fairness and legality, is seen as part of the mediator’s responsibility. In the same vein, one of the major codes of mediator ethics

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<sup>47</sup> For example, opponents of so-called mandatory arbitration have argued that, unless it is reformed to include greater formal protections, arbitration should not be used—not even permitted—in cases where the parties are from groups of unequal power, even though current law validates such use. See Sarah Rudolph Cole, *Uniform Arbitration: One Size Fits All Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 764–73 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997). The controversial cases include employment discrimination, consumer fraud (especially in the financial sector), and other similar areas. Cole, Schwartz, and others argue that arbitration in its classic, informal form should be avoided in these kinds of cases; it should be limited to use in cases involving equal parties such as typical business disputes, where arbitration first became popular. They use a distinction made famous decades ago to suggest that the use of arbitration—and by analogy any informal process like mediation—is unsafe in cases where one side is a “have” and the other a “have-not” because formal protections, substantive and procedural, are needed to prevent injustices visited by “haves” upon “have-nots.” Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98–100 (1974).

<sup>48</sup> Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 977–78 (2004) (citing Supreme Court of Virginia Mediator Mentee Evaluation Form (available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/forms/adr1001.pdf>)).

<sup>49</sup> Bush, *supra* note 48, at 976–77 (citing Maine Judiciary’s Court Alternative Dispute Resolution Service (CADRES) Observer’s Checklist for Mediation (copy on file with author)).

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requires that a mediator suspend or terminate a session when “the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable” or when “a participant is using the mediation process to gain an unfair advantage.”<sup>50</sup> In scholarship on mediator practice, it is also a common view that, “[w]hen disparities in power or knowledge disable a weaker party from effective bargaining, the mediator must intervene to avoid a patently unfair agreement. . . .”<sup>51</sup> In all these sources, there is a common view: the mediator is expected to monitor for and ensure that mediated agreements meet basic standards of substantive fairness.

In short, defenders of mediation argue that the critics’ concern that mediation will permit parties to be lured into unjust agreements is unwarranted, because given their training and their ethical sensitivities, good facilitative mediators will take responsibility for monitoring the fairness of agreements and intervening to prevent unjust agreements—using various methods calculated to do so. Injustice is therefore unlikely to occur in individual cases, and there will be no accumulation of little injustices that threatens social justice overall. Of course, this argument responds only to the concern for avoiding injustices at the micro level that might cumulatively impact social justice adversely at the macro level. It does not address at all the privatization critique, that mediation offers no opportunity for affirmatively improving macro-level social justice, and indeed diverts attention from that effort.

### B. *The Mediator’s Job of “Power-Balancing”*

Beyond the other methods of taking accountability for substantive fairness, one specific method of doing so is emphasized by mediation’s defenders, a method commonly referred to as “power-balancing.” It is at the heart of best practices, according to most authorities, and they argue that it is a solid guarantee that mediation will not result in micro-level injustice in individual cases.

The mediator’s job of power-balancing is recognized as a key part of his or her work by many authoritative sources. For example, Christopher Moore,

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<sup>50</sup> Model Standards of Practice for Family and Divorce Mediation (Standard XI. A., Secs. 4 & 6.), 35 FAM. L.Q. 27, 37 (2001).

<sup>51</sup> Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 521 (1991); see also Nolan-Haley, *supra* note 44; Coben, *supra* note 33, at 83–87; Waldman, *supra* note 44.

author of one of the basic and widely used texts on mediation practice, includes the following advice regarding power-balancing:

Mediators can work with both weaker and stronger parties to minimize the negative effects of unequal power. . . . [According to some,] the mediator's primary task is to manage the power relationship of the disputants. In unequal power relationships, the mediator may attempt to balance power. "To strike the balance, the mediator provides the necessary power underpinnings to the weaker negotiator—information, advice, friendship—or reduces those of the stronger." . . . [T]he mediator may undertake moves to assist the weaker party assess and mobilize the power he or she possesses. . . . [Such] moves may include: assisting the weaker party in obtaining, organizing and analyzing data, . . . educating the party in planning an effective negotiation strategy, aiding the party in developing . . . resources [to continue to negotiate, and] encouraging the party to make realistic concessions. . . . This role of mediator as organizer has been practiced in husband-wife disputes, labor management conflicts, community disputes, large-scale environmental contests, and interracial disputes.<sup>52</sup>

As is evident from this description, Moore believes that the mediator has substantial tools at his or her disposal that can effectively protect weaker parties from the effects of unequal power in the mediation, and thus prevent unjust outcomes. According to Moore and others, the mediator is expected to use these tools to do just that.<sup>53</sup>

John Haynes, another widely recognized authority and one of the founders of divorce mediation, goes even farther in his endorsement of power-balancing and his claim that it is effective in preventing unjust outcomes:

Power balancing is important because . . . "equality of initial power or resources . . . is likely to result in an approximately equal division of outcomes, whereas differential power or resources is likely to result in an unequal distribution—with [those] possessing greater power or resources demanding a larger share of the outcomes." . . . My interest is in analyzing how each person accrues and uses power and how the distribution of power

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<sup>52</sup> CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 391–93 (3d ed. 2003) (quoting in part James A. Wall Jr., *Mediation: An Analysis, Review, and Proposed Research*, 25 J. CONFLICT RESOL. 157, 164 (1981)).

<sup>53</sup> See, e.g., Gunning, *supra* note 33, at 88–90; Maute, *supra* note 51; see also *supra* text accompanying notes 43–46 (discussing other mediator practices designed to compensate for power imbalances).



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impacts the negotiations between them. The mediator needs to [discover] the various power attributes that each partner has and discover where that power lies and whether it is sufficiently imbalanced to adversely affect the negotiations. When the power balance interferes with the couple's ability to negotiate a fair agreement, I believe the mediator has a responsibility to correct that imbalance.<sup>54</sup>

Haynes goes on to explain that there are multiple strategies by which the mediator can "correct" the power imbalance, including "identifying with the person under attack" and "controlling the communication" between the parties.<sup>55</sup> Regarding the latter strategy, Haynes explains that:

[T]he mediator intervenes to take charge of the way the couple communicate and reorganizes it to disempower the overly powerful spouse and empower the powerless spouse. [In one case the husband goaded his wife by not responding to her and then saying her story was crazy, and the wife exploded, having fallen for the provocation.] Holding my hand out to stop her, I restated her position minus the unnecessary adjectives and decibels. This forced [him] to respond to the content of the message and deprived him of the ability to goad [his wife] to a point of irrationality. I disempowered him and empowered [her] by helping her maintain control of herself and the situation. Thus the mediator adjusts the power imbalance sufficiently to permit the negotiations to proceed fairly and smoothly.<sup>56</sup>

It is very clear that these well-respected mediation experts regard power-balancing as a key responsibility of the mediator, that they identify practical strategies to discharge this responsibility, and that they believe that the mediator's power-balancing can effectively protect weaker parties from stronger ones who could otherwise take advantage of their power to gain unjust and unfair agreements.

The examples exemplify the view that power-balancing in mediation can be effective in avoiding injustices at the micro level, in individual cases, and thereby avoid cumulative negative impacts on macro-level social justice. In recent years, proponents of mediation have gone further and argued that certain kinds of power-balancing in individual cases can *directly* address social justice at the *macro* level. Explaining how the mediator can "partner"

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<sup>54</sup> John Haynes, *Power Balancing*, in *DIVORCE MEDIATION*, *supra* note 11, at 280–81 (quoting in part JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 79 (1975)).

<sup>55</sup> *Id.* at 289–90.

<sup>56</sup> *Id.* at 290–91.

with parties in the creation of “alternative narratives” of the conflict, these mediators say that this strategy addresses macro-level social justice directly:

Stories that come to dominate over other stories are complicit in the creation of power in social relations. We would suggest [that the] goals for a . . . mediator [include] opening space for people to make discursive shifts. . . . These shifts that take place are not just in any direction. It would not be acceptable for mediation to create shifts toward greater *social injustice*. The goals of mediation need to have an ethical dimension to which a mediator needs to be accountable. *Mediation should stand for the advancement of equity, justice and democratic partnership, and oppose practices of exclusion, systematic silencing and subjugation.* . . . The recognition that the mediator is a part of the conflict and its movement towards a solution allows the mediator to address power differentials in the relationship, particularly those which become evident through the process of deconstructing dominant discourses.<sup>57</sup>

In other words, by guiding the parties to a different and more just view of the “story” of their conflict and their relationship, including how it has been shaped by larger social forces, mediators can support social justice at both the micro *and* macro levels.

### C. “Mediation for Social Justice”

A third line of response to the social justice critics goes even further in arguing that mediation can address social justice directly at the macro level. The responses in Sections A and B focus on the protections against unjust outcomes that are “built into” mainstream facilitative mediation practice, and primarily emphasize their effectiveness in avoiding injustice in individual cases, so that micro-level effects do not accumulate into macro-level social injustice. In effect, these defenders are responding to the “informalism” aspect of the social justice critique. The third line of response addresses the “privatization” aspect of the critique.

This response begins by recognizing that social justice at the macro level demands more than ensuring fairness in individual cases, and it acknowledges the limits of conventional mediation practices in going beyond that function. But this response argues that variations in mediation practice

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<sup>57</sup> John Winslade & Gerald Monk, *A Narrative Approach in Mediation*, [http://narrative-mediation.crinio.org/documents/mini-grants/narrative\\_mediation/Context\\_narrative\\_mediation.pdf](http://narrative-mediation.crinio.org/documents/mini-grants/narrative_mediation/Context_narrative_mediation.pdf) (emphasis added).

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are possible that effectively serve social justice at both the micro and macro levels. That is, it describes a “social justice” model of mediation that departs from conventional facilitative practice and responds directly to the critics’ concerns for advancing social justice at the macro level.

An early example of an explicit argument that mediation could be used to directly promote macro-level social justice came from the work of scholar/practitioners at the University of Michigan’s Program on Conflict Management Alternatives.<sup>58</sup> They argued that mediators could and should support justice not only at the micro level—by facilitative practices to ensure fair outcomes in individual cases—but also at the macro level.<sup>59</sup> In practice, this would mean that mediators should adopt “nontraditional” roles including, for example, informing and educating parties about the larger structural context of their conflict, or showing them how their problems might relate to and stem from larger structural inequities.<sup>60</sup> The full implementation of this kind of practice could involve encouraging and assisting in coalition-formation and organizing, guiding the “have-not” parties to establish links among themselves and with other groups, as a step toward power shifting and increased social justice.<sup>61</sup> In effect, the suggestion was for mediators to serve in part as advisors if not advocates for weaker parties, offering them guidance and help in “organizing” and “mobilizing” for greater power.

A similar view of mediation was thought by some to be the guiding vision of a much-studied community mediation program launched in the mid-1970s in California, the Community Board Program.<sup>62</sup> The kind of education and organizing for social justice described by the Michigan

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<sup>58</sup> See Mark Chesler, *Alternative Dispute Resolution/Conflict Intervention and Social Justice*, Program on Conflict Management Alternatives (Working Paper No. 20 1989); see also Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Milner and Merry*, 21 LAW & SOC. INQUIRY 713, 715 (1996); Christine B. Harrington, *Community Organizing through Conflict Resolution*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 401, 416 (S.E. Merry & N. Milner, eds., 1993) [hereinafter POPULAR JUSTICE].

<sup>59</sup> See Chesler, *supra* note 58, at 27–28.

<sup>60</sup> *Id.* at 47–50.

<sup>61</sup> *Id.* at 50–55.

<sup>62</sup> See Bush, *supra* note 58, at 718–21; Sally Engle Merry & Neal Milner, *Introduction*, in POPULAR JUSTICE, *supra* note 58, at 3 (introducing the volume’s report on a major study of the Community Board Program by a team of sociologists, which links the results and implications of the study to larger issues affecting the mediation field, especially those involving social justice).

program was at least part of the original intention behind the California program.<sup>63</sup> Critical research on the program, after a decade of operation, disclosed that it eventually drifted from this approach into a more conventional, facilitative approach to practice.<sup>64</sup> However, part of the explanation for this change was that the program gave mediators no practical training or guidance on “how to ‘link the individual to social transformation,’” how to help parties see the larger forces behind their individual problems.<sup>65</sup> The point is that some of those who studied the Community Board Program believed, like the Michigan scholars, that if practiced properly, Community Board mediations could indeed have served as a direct means of improving social justice.

Another example of “social justice mediation” has already been alluded to above, in the discussion of power-balancing. That approach is most commonly called “narrative mediation.”<sup>66</sup> In this kind of practice, the mediator focuses on identifying the stories or narratives embedded in the parties’ conflict, and helping the parties to “reweave” those narratives in

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<sup>63</sup> See Frederic L. DuBow & Craig McEwen, *Community Boards: An Analytic Profile*, in POPULAR JUSTICE, *supra* note 58, at 125, 133, 164–66 (describing the program’s goal as “building neighborhood capacity for civic work . . . and thus more generally for neighborhood change. . . .”); Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, in POPULAR JUSTICE, *supra* note 58, at 201, 226–28 (arguing that, in the view of the program’s founder, this kind of mediation program “warrant[s] the urgent support of policymakers” because possible impacts of the program include “transformation of individual grievances into collective problems” and “giv[ing] impetus to action for social reforms.”).

<sup>64</sup> See Dubow & McEwen, *supra* note 63, at 166; Douglas R. Thomson & Frederic L. DuBow, *Organizing for Community Mediation: The Legacy of the Community Boards of San Francisco as a Social-Movement Organization*, in POPULAR JUSTICE, *supra* note 58, at 169, 193–97.

<sup>65</sup> Bush, *supra* note 58, at 724 (citing Vicki Shook & Neal Milner, *What Mediation Training Says—or Doesn’t Say*, in POPULAR JUSTICE, *supra* note 58, at 239, 258–59).

<sup>66</sup> See Winslade & Monk, *supra* note 57; see also JOHN WINSLADE & GERALD R. MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000); Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, NEGOT. J., July, 1993, at 245; Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 120 (2001) [hereinafter *Space*]; Sara Cobb, *A Developmental Approach to Turning Points: “Irony” as an Ethics for Negotiation Pragmatics*, 11 HARV. NEGOT. L. REV. 147, 160–71 (2006) [hereinafter *Irony*]. Narrative mediation was largely inspired by “narrative therapy,” a particular approach to therapy based in theories of discourse.

ways that help resolve the conflict.<sup>67</sup> However, the mediator's intention in "re-storying" the conflict is not simply to produce a specific resolution, but also to "create" a new narrative that reshapes the parties' overall power relations in the direction of greater justice.<sup>68</sup> The mediator is an active "co-creator" of this new narrative; and in this role she or he helps the parties to see and acknowledge how their own conflict relationship reflects inequities found in larger social structures and arrangements, and then consciously decide to act in a way that avoids reproducing those inequities. The increased consciousness of social injustice that is engendered in this kind of mediation process can be extended into the parties' other relationships and engagements, which can lead to other steps to improve the systemic inequities that were reflected in the original conflict. The key is that in this view, best practices in mediation include educational and consciousness-raising measures that not only prevent unfair individual outcomes, but also promote social justice beyond the confines of individual cases.<sup>69</sup> This kind of practice is indeed intended as "mediation for social justice" at the macro level, not just mediation that avoids unfair outcomes for individuals.

Finally, recalling the discussion in Section A regarding the accountability principle advocated by Lawrence Susskind, that principle can itself be practiced in a way that focuses the mediator's sense of responsibility not only on fairness for individual parties but on justice for disadvantaged *groups* who will be affected by the outcome of a mediation. Indeed, Susskind's own primary concern was for avoiding injustices to unrepresented groups affected by the resolution of environmental conflicts.<sup>70</sup> To avoid those injustices, in Susskind's view, the mediator could and should intervene directly to design a solution that takes larger social inequities into account, and should then use his or her "clout" to persuade the parties to accept such a solution.<sup>71</sup> In this view of best practices, the mediator serves not merely as educator or counselor to the parties, but as the actual designer of a solution that improves macro-level social justice. This has been called the "activist" conception of

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<sup>67</sup> Winslade & Monk, *supra* note 57.

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., Leah Wing, *Wither Neutrality? Mediation in the 21<sup>st</sup> Century* (unpublished paper, [www.prasi.org/uploads/12\\_PRASI\\_Wing.doc](http://www.prasi.org/uploads/12_PRASI_Wing.doc)).

<sup>70</sup> Susskind, *supra* note 35, at 6–10, 37–40, 46–47.

<sup>71</sup> Susskind, *supra* note 35, at 42, 46–47.

the mediator's role, and it has gained high praise from some scholars and practitioners.<sup>72</sup>

#### D. *The Range of Responses*

The range of responses discussed above certainly indicates that the concerns of the social justice critics have not been ignored by the mediation field. The attempt to address those concerns has been consistent and multifaceted, including: an increased focus on the mediator's accountability for substantive fairness of outcome, and specific methods for ensuring it; an intensive attention to the importance of power-balancing and the skills needed to do it effectively; and an exploration of variations on standard facilitative practice that give the mediator a broader and more active role in bringing concerns for social justice explicitly to the parties attention, and even in designing outcomes that take macro-level social justice explicitly into account. Despite all this, serious doubts remain about whether any of these measures have served adequately to avoid the negative impacts on social justice that mediation's critics fear. The following part explores those doubts.

#### IV. THE PRACTICAL LIMITS OF "DOING JUSTICE" IN MEDIATION

In the original critique of ADR, the critics did not suggest that mediation and other informal processes had no valid use. They simply claimed that mediation was inappropriate and dangerous when dealing with disputes involving significant inequality between the parties.<sup>73</sup> In such cases, Fiss and other critics argued that adjudication and other formal, rule-oriented, processes were called for, because only such processes could afford the protection against micro-level injustice that are needed in the presence of unequal power, and only they could impact social justice at the macro level.<sup>74</sup> In short, the critics believed that whatever else might be achieved through mediation, "social justice" at the macro level is not really one of the things that mediation can be expected to achieve. Indeed, mediation would

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<sup>72</sup> See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 230 (1995); Kolb & Kressel, *supra* note 46, at 466-74; John Forester, *Lawrence Susskind: Activist Mediation and Public Disputes*, in *WHEN TALK WORKS*, *supra* note 46, at 309.

<sup>73</sup> See *supra* notes 26-33 and accompanying text.

<sup>74</sup> See Fiss, *supra* note 3, at 1085-90; see also Chesler, *supra* note 58, at 16-25.

actually undermine social justice—not only by failing to produce any aggregate impacts but also by regularly permitting injustices at the micro level.<sup>75</sup> In this view, mediation could not ever help to achieve macro-level social justice, and it would probably permit substantial micro-level injustice. In this Part, several practical limitations of mediation are examined, which taken together suggest that the critics' doubts about the possibility of "doing justice" in mediation might be warranted, despite the responses discussed in the previous part.

### *A. Doing Micro-Level Justice "Inside the Room:" Limits on Mediator "Accountability" and "Best Practices"*

As discussed in Part III, mediation's defenders argue that mediators' use of best practices provide reliable assurance that individual cases will reach fair outcomes—that micro-level justice will be done "in the mediation room." If that is the case, the accumulation of fair outcomes, in cases involving parties of unequal power, would avoid micro-level harms and would instead contribute to justice in the aggregate, social justice. However, there are a number of reasons to question whether the kinds of "best practices" discussed above are reliable or sufficient to avoid the risks of micro-level injustice posed by mediation.

First, there is no significant body of research that documents the substantive fairness of mediated agreements, particularly in cases involving parties of unequal power.<sup>76</sup> Of course, the absence of research confirming the

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<sup>75</sup> See *supra* notes 11–33 and accompanying text.

<sup>76</sup> To the contrary, one well-known study of outcomes in mediation compared to outcomes in court, for similar cases, showed that racial minorities more often than not achieved poorer outcomes in mediation than in court, whereas the reverse was true for nonminority parties. See MICHELLE HERMANN ET AL., AN EMPIRICAL STUDY OF THE EFFECTS OF RACE AND GENDER ON SMALL CLAIMS ADJUDICATION AND MEDIATION (1993) (cited in ALFINI, *supra* note 1, at 371–75). This type of study lent credibility to claims made earlier that mediation, as an informal process, would disadvantage minorities. Similarly, some studies of divorce mediation have shown that mediation produces agreements for "joint custody" far more often than such custody is awarded in court decisions—a result that may suggest that women, who seek primary custody more often, fare worse in mediation than men. See, e.g., Roz Zinner, *Joint Custody: Smart Solution or Problematic Plan*, <http://www.adrr.com/adr4/joint.htm> (last visited Oct. 20, 2011). Even the extensive research conducted on workplace mediation in the U.S. Postal Service's REDRESS Program, while it shows that managers and employees express roughly similar degrees of satisfaction with mediated outcomes, presents no evidence of what those outcomes were, or how they compared with outcomes of similar cases in other

fairness of mediated outcomes does not prove the absence of substantive fairness at the micro-level. It simply makes it difficult to substantiate the claims that “best practices” actually produce such fairness. Apart from research, however, there remain serious conceptual and logical questions about the best practices claim itself. Certainly, facilitative mediators operate with good and serious intentions to be accountable for substantive fairness of outcomes in individual cases, to balance power whenever needed for the protection of weaker parties, and to explore practices that educate parties on the connections between their situations and larger social inequalities.<sup>77</sup> However, those intentions can be hard to carry out effectively in actual practice, and there are good reasons to believe that practice falls short of the ideal, in several important and consequential respects.

The best practices commitment to be accountable for substantive fairness faces several daunting obstacles in practice. First, despite the theoretical movement towards the commitments to mediator accountability and to achieving win-win outcomes that include substantive fairness, the real world demand of client expectations often leads mediators to privilege settlement *per se*, with much less attention to the quality of that settlement.<sup>78</sup> This is especially so when “client” means not only the actual parties to the conflict, but an institutional client like a court, agency, organization or the like, whose primary interest is likely to be the speedy disposition of the case in a way that

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forums. See LISA BLOMGREN BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE*, 19–22 (2003) (citing multiple studies of the REDRESS mediation program). In other words, like most of the research done to demonstrate mediation’s value over the years, this research measures attitudes about outcomes rather than the objective fairness of the outcomes themselves.

<sup>77</sup> See *supra* notes 34–71 and accompanying text.

<sup>78</sup> See, e.g., Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 136–40 (2004) [hereinafter Welsh, *Democratic Justice*] (arguing that in the court context, self-determination is attenuated and mediators become “judging adjuncts”); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) [hereinafter Welsh, *Self-Determination*] (describing how court-connected mediation involves mediator tactics that pressure parties into settlements); Nolan-Haley, *supra* note 44 (suggesting that court-connected mediation may sacrifice the value of justice for the parties); Coben, *supra* note 33, at 74–77 (arguing that the exercise of influence to promote settlement has become “triumphant” in mediation practice); Bush, *supra* note 1, at 727–32 (summarizing multiple articles and studies commenting on and documenting the tendency of mediators to focus on settlement *per se*).



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obviates the need for further, more formal procedures.<sup>79</sup> In short, for many institutional clients or consumers of mediation, the primary aims are settlement *per se* and savings of time and other costs. If so, mediators serving such clients will feel constrained to concentrate on achieving a timely settlement, even if it means attending less to the substantive fairness of the settlement achieved. There is substantial evidence that this is in fact what occurs with mediators operating in such contexts.<sup>80</sup> Couple these findings with the likelihood that cases mediated for such institutional clients often involve parties of unequal power—divorcing husbands and wives, landlords and tenants, businesses and consumers, school officials and parents—and the likelihood emerges that pressured settlements in cases involving unequal parties result in substantively unfair outcomes. In other words, the weaker party is more likely to fare badly in a pressured settlement, and pressured settlement is common because of the institutional client's demands. Best practices of accountability for outcome fairness, such as those discussed in the previous part, are fine in theory but they often take a back seat in practice to settlement-production demands.<sup>81</sup> As a result, micro-level justice suffers.

The difficulty of achieving accountability for outcome fairness in actual practice is increased by two other constraining factors: the limited

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<sup>79</sup> See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 643 n.3 (2002); Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 260, n.5 (Joseph Sanders & V. Lee Hamilton, eds., 2001); Elizabeth Plapinger & Donna Stienstra, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3–6, 14–19 (1996), [http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/\\$file/adrsrbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/$file/adrsrbk.pdf), (last visited May 30, 2011). All of these sources document the increase in institutional use of mediation, especially by courts at the state and federal levels.

<sup>80</sup> Studies of court-referred mediation, for example, document that mediators apply both subtle and overt pressures for settlement, and these same studies suggest that this often comes at the expense of the quality and fairness of the outcome. *See supra* note 78 and sources cited therein (documenting the reality of mediators using pressure and even coercion to generate settlements, and also commenting on the likely negative impacts on outcome fairness); Bush, *supra* note 1, at 735–38 (offering specific illustrations of mediator coercion drawn from various studies). Studies of mediation involving other institutional clients, such as school districts, present similar findings. *See also* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 643–651 (2004).

<sup>81</sup> *See* Coben, *supra* note 33, at 74–77 (offering a passionate discussion on the subject of mediators' use of pressure to achieve settlement above all else).

information available to mediators, and the inevitable impact of cultural biases on mediators and mediation. Regarding the first factor, the very nature of mediation as an informal process means that mediators can never count on the completeness or accuracy of the information presented by parties in the session. Nor is there any way for mediators to require more information or to authenticate what is offered.<sup>82</sup> Therefore, if stronger parties have greater access to relevant information, and either conceal that information or manipulate its presentation, neither the other party nor the mediator has the means to prevent or even discover this. If the mediator facilitates a settlement based on such partial information, the resulting outcome is very likely to lack substantive fairness—probably a common result in cases involving parties of unequal power and resources, and a result that mediators are hard pressed to prevent even with the best of intentions. The option of the mediator stepping in to provide or discover needed information, mentioned above and more fully discussed in the following section, faces practical and ethical obstacles of its own.<sup>83</sup>

The other factor constraining accountability for outcome fairness derives from both the mediator's personal limitations and those embedded in standard mediation procedures. As to the first, mediators are themselves subject to the same cultural and social influences as others, and those influences involve many biases that predispose us to understand and recognize accounts offered by people who possess certain characteristics, and to misunderstand or overlook accounts offered by people with different characteristics. Language usage, modes of verbal and nonverbal expression, degrees of rationality and logic in argumentation, and similar factors, lead to different responses from mediators of different genders, classes, and ethnic identities.<sup>84</sup> Since the large majority of mediators tend to be from the majority group in each of these dimensions, it will inevitably be harder for them even to understand fully, much less give adequate weight to the

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<sup>82</sup> See, e.g., Bush, *supra* note 11, at 260–66 (discussing the limitations on mediator's ability to act as protectors of parties' rights). Unlike judges or even arbitrators, who have the authority and the tools to demand and test the authenticity of evidence, mediators have no such authority or tools.

<sup>83</sup> See *infra* notes 91–92 and accompanying text.

<sup>84</sup> See Wing, *supra* note 69 (presenting a strong argument regarding the effect of mediators' own class and cultural biases on their ability to understand parties of different classes and cultures); see also Gunning, *supra* note 17 (presenting an extensive discussion of the effects of cultural diversity on fairness in the mediation process).

accounts of parties with minority characteristics.<sup>85</sup> While training usually includes some attention to the subject of cultural differences, the minimal exposure to the subject that is possible in a standard mediator-training program is unlikely to overcome the susceptibility to longstanding and ingrained assumptions and attitudes. Therefore, even if mediators resist the pressure for settlement and strive to ensure substantive fairness, it may be very hard to identify what fairness demands, because one side—probably the cultural minority party—will be harder for the mediator to understand than the other. In precisely those cases where mediators are needed most to ensure substantive fairness, they may have the greatest difficulty in doing so, despite their best intentions.

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<sup>85</sup> See Wing, *supra* note 69. A research study conducted several years ago, by a multi-racial team of researchers, strongly suggested that minority group members are underrepresented in the mediation field. The study interviewed nearly 100 individuals from various minority groups regarding their experiences as mediators or aspiring mediators, and the barriers to their participation and advancement in the field. The large majority reported that gaining access to the field was extremely difficult—that it was like a “gated community.” See Maria Volpe, et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119, 139 (2008). Some of the greatest barriers were those posed by the “professionalization” of the field, and especially the requirements of substantive knowledge expertise that could only be satisfied at substantial investments of time and funds. See *id.* at 136–37. Other factors also constituted significant barriers, including the implicit requirement of pro-bono or volunteer service as a precursor to paid work, and the difficulty of gaining access to the networks of working mediators who might serve as mentors. See *id.* at 138–41. The impact of these and other barriers to potential minority mediators, itself an injustice, multiplies the likelihood of injustice to minority parties in mediation. As discussed in the text, mediators face difficulty in ensuring justice in the room by both accountability practices and power-balancing, when the mediators themselves have cultural backgrounds and biases that obstruct their full understanding of and attunement to the discourse patterns of minority disputants. The likely result is injustice in the room, despite the good intentions of the mediators involved. Such injustice would probably be lessened if more mediators from minority groups were available to serve in cases involving minority parties, since the problem of biased understanding would be lessened if not eliminated. However, the lack of practicing minority mediators, itself an injustice, makes it harder to guard against injustice to minority parties in actual mediations. Some scholars have noted this problem specifically in relation to discrimination claims in workplace disputes, where use of mediation has increased greatly, but not use of minorities as mediators. See, e.g., David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 37–39 (2008).

Apart from the difficulty of trying to transcend their own cultural biases, mediators are typically using *procedures* that also carry cultural biases that may limit mediation's ability to do justice in the room. Analyses by many scholars have pointed out that the normal guidelines followed in mediation sessions advantage parties from majority groups and disadvantage those from minority groups. The emphasis placed on sequential turn-taking, on giving relatively "equal time" to both parties, on encouraging rational discussion of problems and solutions, and on discouraging strong and extended emotional "outbursts"—all of these and other standard features of mediation procedure tend to systematically advantage majority group parties who are culturally attuned to these "dominant" modes of discourse, and disadvantage minority group parties attuned to other modes of discourse. This insight that mediation's standard discursive norms work against minority group parties has been argued by scholars whose bases include critical-race theory, feminist theory, and various other "outsider" perspectives.<sup>86</sup> All agree that the kind of discourse privileged in standard mediation practice disadvantages the minority party when the other party is a majority group member. Paradoxically, this will likely be the case even if the mediator him- or herself is a minority group member, because the procedures used will have the same discursive limits. The result is to make it harder for minority parties to effectively present their views, which again limits the ability of the mediator to identify where substantive fairness lies and ensure that justice is done in the room.

Taken together, the above limitations—pressures from institutional clients to achieve timely settlements, inability to uncover and authenticate information, cultural biases affecting mediators' personal attunement to minorities' modes of expression, and cultural biases embedded in standard mediation procedures—all work to make it very difficult in practice for mediators to ensure the substantive fairness of outcomes of individual cases, where the parties are from groups of unequal power and resources. This difficulty is likely to persist even though accountability methods like those discussed in Part III above are employed.<sup>87</sup> As a result, individual cases involving unequal parties will often result in unfair outcomes in mediation, and the accumulation of unfair outcomes at the micro level will not add to social justice at the macro level, but will indeed subtract from it, just as the social justice critics fear.

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<sup>86</sup> See, e.g., Wing, *supra* note 69; Grillo, *supra* note 28, at 1572–87; Delgado et al, *supra* note 23; Gunning, *supra* note 17.

<sup>87</sup> See *supra* notes 34–51 and accompanying text.

*B. Doing Micro- and Macro-Level Justice "Within and Beyond the Room:" Limits on Power-Balancing and "Activist" Mediation*

Practical limitations also draw into question the claim of mediation's defenders that mediators can counter micro-level injustice, and even promote macro-level social justice, by including power-balancing in their best practices, or by introducing less conventional practices like narrative or activist mediation.

The limits of power-balancing relate to the concern for doing justice both within and beyond the mediation process. Regarding "justice in the room," which was discussed at length in the previous section, the intention to do power-balancing faces some of the same barriers mentioned there, as well as others not mentioned. Where one party holds private information that might disadvantage the other, the mediator does not even know of the need to counteract that disadvantage. Nor does she or he have means of bringing that information to light. So, unequal access to information—a critical kind of power imbalance—is usually not within the mediator's power to remedy. Similarly, if the mediator lacks full sensitivity to one party's modes of expression, due to limitations of cultural bias, the mediator will have trouble assisting that party to voice its concerns effectively and stand its ground against a more powerful party who shares the mediator's cultural background. Power-balancing, in short, is not always as easy as the texts quoted in Part III might suggest.<sup>88</sup>

Even when a mediator does recognize the need to balance power, and has tools to do so like those suggested in Part III, there is the further limit suggested in the original debate between Stulberg and Susskind about mediator accountability. As Stulberg argues persuasively there and elsewhere, power-balancing by the mediator introduces a practical incoherency that is likely to undermine the mediator's ability to facilitate any kind of agreement, fair or otherwise.<sup>89</sup> In effect, the power-balancing mediator becomes an advocate for one party, as illustrated by the experts quoted in the previous part; however, engaging in advocacy for one party

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<sup>88</sup> See *supra* notes 52–57 and accompanying text.

<sup>89</sup> Stulberg, *supra* note 34, at 86–87, 91–97. See also Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005) (giving examples of how justice is served in mediation by measures that stop short of power-balancing, *id.* at 241–44, and concluding that "mediation . . . powerfully exemplifies those features of a procedure suitably viewed as one of pure procedural justice . . . . [P]arty-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed." *Id.* at 245.)

risks losing the trust of the other party. Once that trust is lost, the mediator cannot work effectively to do other crucial tasks, including questioning or probing, challenging positions, reality testing, offering options—because one of the parties no longer is confident of the mediator’s impartiality or neutral motives.<sup>90</sup> Apart from this practical problem, the one-sided interventions typically involved in power-balancing—including those cited in Part III such as providing expert information or advice to disadvantaged parties<sup>91</sup>—risk violating ethical standards requiring mediator impartiality and party self-determination.<sup>92</sup> In sum, if the mediator is not strong enough in assisting the weaker party, the inequality remains in the room; but if she or he is too strong, the mediation may be over because the other party loses trust, or it may violate ethical standards. Perhaps a talented and subtle mediator can engage in power-balancing without compromising party trust and mediator ethics, but it is not an easy tightrope to walk in practice. In short, power-balancing is not a reliable guarantee of justice in the room.

Moreover, paradoxically, power-balancing can result in micro-level injustice even when it seems to “work” to counteract unequal power in the mediation session itself. Consider for example a discrimination case between a white manager and a minority employee in mediation, in which the

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<sup>90</sup> See Stulberg, *supra* note 34, at 86–87, 91–97.

<sup>91</sup> Assisting disadvantaged parties by providing expert information (or advice) is often suggested as a necessary means of power-balancing. See, e.g., Nolan-Haley, *supra* note 44; Maute, *supra* note 51. See *supra* notes 44–46 and accompanying text.

<sup>92</sup> Mediator ethics codes often include provisions requiring mediators to support party self-determination and maintain impartiality. At the same time, they also include provisions that hold mediators responsible for ensuring “informed consent” to terms of agreement, which could be read to require a power-balancing intervention in circumstances of unequal information. The inclusion of all these provisions, together, creates ambiguity and confusion about whether power-balancing, such as providing parties with legal or other expert information, is permitted or whether it violates other ethical requirements like those first mentioned. See, e.g., James J. Alfani, *Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 830–31 (2008); Jamie Henikoff and Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 88–91 (1997); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, J. DISP. RESOL. 1, 40–47 (1994) (all discussing the potential conflicts between different ethical requirements implicated in power-balancing). Stulberg and others argue that the confusion is unnecessary, since consistent support for party self-determination is as much a guarantee of justice as mediation can, or should, provide. See Stulberg, *supra* note 89; see also Joseph B. Stulberg, *Fairness in Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998); Bush, *supra* note 11.

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employee lacks the expressive ability, and the knowledge of relevant regulations, possessed by the manager. Assume that the mediator overcomes the limits discussed above and uses power-balancing to achieve a substantive agreement that is truly fair to the employee, one that the employee could not have attained without her help. Nevertheless, after the mediation ends, the parties return to the workplace—or, in the case of a different kind of case, to the home, the neighborhood, the apartment house. And there, outside the mediation room, the inequality of power probably remains as real as it was before the mediation took place. That reality may render illusory the justice achieved in mediation, in various ways: enforcing compliance may not be so easy for the employee, or the manager may act in ways that simply vitiate the gains made in mediation.<sup>93</sup> Still worse, the support of the mediator may have led the employee to assert himself in mediation, although he would not have done so on his own because of a reasonable fear of retaliation on the job—and then retaliation unfolds after the mediation. In effect, in the artificial environment of mediation, power-balancing can “help parties” to take stands that expose them to new risks in the real environment, risks they did not face beforehand. There is no way for mediators to know with certainty that power-balancing will not have any of these effects, so the strategy always involves risks that unfairness outside the room will persist or even increase. One experienced labor mediator used to say, in explanation of his strictly neutral posture despite the inequality of power that often existed in his mediations, that after mediation, the lion remains a lion, and the lamb remains a lamb, and that his job was to “make the lion-lamb relationship clear to the lamb.”<sup>94</sup> In short, he didn’t encourage lambs to roar at lions.

At a different level, as discussed earlier, some claim that mediators can go beyond power-balancing and aim directly at doing macro-level justice “outside the room,” by using unconventional practices in which they openly adopt an activist role—whether by taking a strong hand in rewriting a more just “narrative” of the parties’ conflict relationship, or by educating the

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<sup>93</sup> Stulberg suggests another possibility, which captures a real difficulty of power-balancing: the mediator’s efforts to ensure parties have full information or to balance power in other ways may, paradoxically, result in creating *more* advantage for the already advantaged party. See Stulberg, *supra* note 92, at 939–941. In this same article, Stulberg offers several other examples of how power-balancing can have perverse impacts of decreasing rather than increasing fairness to a disadvantaged party.

<sup>94</sup> Howard Bellman, *Mediation as an Approach to Resolving Environmental Disputes*, Environmental Conflict Practitioners Workshop, Proceedings (1982) (cited in Helen R. Weingarten & Elizabeth Douvan, *Research Report: Male and Female Visions of Mediation*, 1 NEG. J. 349, 350 (1985)).

parties on the unjust social structural forces affecting their conflict and encouraging them to resist those forces (and advising them how to do so), or both. However, these methods are also likely to face practical limits. First, they face the same problems involved in power-balancing, as just discussed: parties with greater power may have little patience for such methods, and little trust in mediators who use them, and parties with lesser power may be hesitant to take the risks involved in challenging the more powerful. In addition, conformity to ethics requirements of impartiality and self-determination would be questionable in these activist approaches.

Furthermore, there is not yet a great deal of material available to mediators on just how to practice this kind of activist mediation in an effective way. Certainly, there are texts and articles advocating these approaches in general terms.<sup>95</sup> But materials that present the specific skills involved in such approaches do not seem to be widely available, nor is it easy to find opportunities for training in these methods.<sup>96</sup> Until such materials and training become more accessible, it seems unlikely that the activist methods will be practiced widely or skillfully enough to have significant impacts on social justice. Nor is there any research that studies their actual impacts in producing macro-level social justice gains through mediations in which the methods are used.<sup>97</sup> Until such documentation is developed, it is hard to suggest that the possibility of increased social justice through use of these methods is an adequate response to the social justice critics.

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<sup>95</sup> See, e.g., Winslade & Monk, *supra* note 57; WINSLADE & MONK, *supra* note 66; Wing, *supra* note 69.

<sup>96</sup> But see JOHN WINSLADE & GERALD R. MONK, PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT (2008) (making an effort to concretize the practice skills of narrative mediation); Social Justice Mediation Institute Training Announcement, <http://people.umass.edu/lwing/> (announcing a mediation training “designed to explore how identity and power imbalances affect the development and resolution of conflict”).

<sup>97</sup> Indeed, other than the research on the Community Board Program discussed in Part III, see *supra* notes 62–65 and accompanying text, there does not seem to be much documentation of mediation practices or programs that explicitly employ the activist methods. But see Forester, *supra* note 72; Cobb, *Irony*, *supra* note 66; Cobb, *Space*, *supra* note 66. All these articles provide some concrete account of narrative mediation practices, but none of them tries to document the positive impacts they might have on social justice.



*C. The Reality of Mediation's Risks to Social Justice*

The examination made in this part suggests that the critics are probably right about the risks posed to social justice by the use of mediation. The informalism and individuation that are essential to the mediation process create risks of injustice, both at the micro and the macro levels. And the responses of mediation's defenders based on the supposedly corrective impacts of best practices and activist approaches are not persuasive, given the limits on those practices and approaches when faced with the practical constraints of real-world mediation. It thus appears valid to say that mediation and social justice are at serious odds and that use of mediation may inevitably undermine the goal of social justice. The final part of this article examines possible alternatives to this pessimistic conclusion, based on the possibility of alternative methods of mediation practice not yet discussed.

V. POSSIBILITIES—MEDIATION, SOCIAL JUSTICE, AND CIVILITY

The inquiry conducted throughout this article can lead to different conclusions about the compatibility of mediation and social justice, and those conclusions carry different implications for attitudes and policies toward, and practices in, mediation. In this final part those conclusions and implications are explored.

*A. Mediation and Social Justice: Fundamentally Incompatible*

For some who care about both mediation and social justice, the analysis of the previous parts suggests that they must choose one or the other pursuit, because there is a fundamental incompatibility between the two. Mediation, because of its fundamental features and the real-world constraints on its practice, simply cannot effectively advance macro-level social justice; worse still, it poses constant dangers of micro-level injustice. So those who care deeply about social justice must reluctantly admit that the use of mediation is a poor way to pursue it. In effect, this leads to the view that mediation should be avoided entirely in all cases that involve parties from disadvantaged groups, parties of unequal power, even if these means abandoning the use of mediation in many contexts where it is widely used today—for example, family, workplace, consumer, discrimination, and other types of disputes.<sup>98</sup>

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<sup>98</sup> A different suggestion has been made by some, in an effort to find a way of preserving mediation as an option for all cases, including those with unequal parties,

That is precisely the conclusion reached by some of mediation's social justice critics, like Delgado and others, as noted much earlier in Part II.<sup>99</sup>

One corollary of this conclusion would be that for cases where the parties are of unequal power, justice requires the use of a formal process, meaning some kind of adjudicatory forum—just as Fiss and others argued decades ago.<sup>100</sup> The fact that such a policy would mean foregoing the savings of time and expense (public and private) provided by mediation should not, in this view, change the conclusion. As Fiss argued, sacrificing social justice by using mediation to save administrative costs is an invidious policy that should be rejected.<sup>101</sup>

Another corollary also follows: those within the mediation field who are fundamentally committed to social justice can and should turn their efforts to direct advocacy for the disadvantaged in court and other formal venues, or in direct political action. They should stop trying in vain to act as protectors and guarantors of justice in mediation,<sup>102</sup> since it is a forum where social justice

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without sacrificing social justice. This would involve making mediation entirely voluntary—ending the practice of *mandatory* referral of cases out of formal processes and into mediation—and also making the agreements reached in mediation *revocable*, at least for “have not” parties. That is, when such parties chose to use mediation and then reached agreement in the process, they would be given a certain “cooling off” period after signing an agreement, during which they could reconsider the wisdom of the deal they had made and rescind it unilaterally. See Nancy A. Welsh, *Reconciling Self-Determination, Coercion and Settlement in Court-Connected Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS* 420, 434–40 (Jay Folberg, et al., eds., 2004) [hereinafter, *DIVORCE AND FAMILY*]. For those “have not” parties who had been pressured or lulled into unjust agreements, despite the best efforts of mediators to avoid that result, this would offer the opportunity to stop the injustice from being effectuated. Of course, this after-the-fact protection would only prevent injustices that were recognizable within a short time, and many parties might not actually realize or discover the unfairness so quickly. Still, this method of “reconciling” the use of mediation with social justice concerns is a clever idea. For now, however, no one has seriously embraced it.

<sup>99</sup> See *supra* notes 26–33 and accompanying text.

<sup>100</sup> See Fiss, *supra* note 3, at 1085–90.

<sup>101</sup> See *id.*; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 4–7 (1989) (presenting the argument of Fiss and other social justice critics as part of a conversation advising a judge about which cases to refer to mediation).

<sup>102</sup> See *supra* Part IV (discussing the limits of mediators' capacity to protect parties from unfair outcomes or otherwise guarantee justice).

cannot be advanced and is regularly compromised.<sup>103</sup> In short, recognizing the incompatibility of mediation and social justice will, understandably, lead some sincere but disappointed practitioners to leave the field entirely, and seek more effective ways of furthering social justice.<sup>104</sup>

### *B. Mediation's Potential: Strengthening Civility Without Risk to Social Justice*

Others, while they acknowledge that mediation is not capable of directly advancing macro-level social justice, still support the continued use of mediation, even in cases involving unequal parties—*provided that* certain kinds of mediation practices are followed. The basis for this view is the claim that, if these kinds of practices are used, mediation can be highly effective in generating important social benefits *other than* social justice, and these benefits justify mediation's continued use (especially since the practices involved will also *minimize* the risks of micro-level injustice, as discussed below). This view is based on the point mentioned above in Part II, that dispute resolution processes can serve different social goals, goals that sometimes compete with one another. Therefore, where other goals are considered equally or more important, and mediation advances them, its use can be supported even in cases where social justice could be at some risk.

One example of this view is found in the work of Bush and Folger, and others, who refocused attention on the public goals, apart from social justice, that originally inspired widespread interest in the mediation process in the 1970s.<sup>105</sup> In its early stages, the modern mediation field gave primacy to two

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<sup>103</sup> See Bush, *supra* note 11, at 259–66 (arguing that mediation cannot provide protection while adjudicatory forums can).

<sup>104</sup> The authors of this article have heard this conclusion from some of our mediator colleagues in dialogues about pursuing social justice through mediation.

<sup>105</sup> Another example is the view of some in the mediation field who support mediation's continued use, in its present form, and even in cases involving unequal parties—where the parties are in some kind of ongoing relationship. This would include family conflicts (over child custody, inheritance, elder care, etc.), workplace conflicts (prior to terminations), parent/school conflicts, and others. The argument in favor of using mediation in such cases, despite the inequality of the parties, is that another goal is at stake in such cases that mediation can well serve, and that second goal “trumps” the goal of social justice. Therefore, even if social justice is put at risk in mediation, the likely attainment of the other goal justifies this risk. The goal that supports such an argument is the “relationship” goal—meaning the preservation or enhancement of an important and ongoing relationship between the disputing parties. Bush, *supra* note 8, at 916–18; Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982). A

important goals or values that mediation was uniquely capable of achieving: supporting party self-determination and enhancing inter-party understanding. The former was emphasized by early leaders of the field like Jay Folberg and Joseph Stulberg<sup>106</sup>; the latter was explained eloquently by Lon Fuller, one of the very first theorists of the field<sup>107</sup>. While both these goals could be viewed as matters of private interest to the parties, they also implicated important social benefits, as explained by Bush and Folger:

Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And *that itself* is the public value that mediation promotes. In other words, going through mediation [can be] a direct education . . . as to self-determination on the one hand and consideration for others on the other. . . . The experience of the mediation process . . . serves the public value of civic education in self-determination and respect for others. . . . In our contemporary society, citizens increasingly suffer from learned dependency—whether on experts, on institutions . . . or otherwise—and from mutual alienation and mistrust, especially along lines of race, gender and class. The resulting civic weakness and division threaten the very fabric of our society. Personal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value—and this is precisely what the process of [mediation] provides. This [strengthening of civility] is the public benefit . . . critical to discussions of the public value of mediation, by comparison to the formal legal process or other ADR processes.<sup>108</sup>

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good example is the post-divorce co-parental relationship between two ex-spouses. If mediation succeeds, by its informal, individuated, and non-adversarial character, in producing an agreement acceptable to both sides, the likelihood is that the agreement thus obtained will preserve an amicable relationship between the parents of a child after divorce. Since absence of hostility between parents is seen by some as the single most important factor in healthy child development after divorce, *see* Center for Children, Families and the Law, PEACE (Parent Education and Custody Effectiveness) Program Handbook 15 (2003) (copy on file with author), parental relationship preservation is a benefit of mediation that justifies the admitted risk that a mediated agreement may involve some unfairness to a weaker spouse.

<sup>106</sup> See FOLBERG & TAYLOR, *supra* note 42, at 35, 245; Stulberg, *supra* note 34, at 113–16; *see also* Bush, *supra* note 11, at 267–68.

<sup>107</sup> See Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325–27 (1971).

<sup>108</sup> BUSH & FOLGER, *supra* note 11, at 81–82 (citing in part Bush, *supra* note 101, at 14–17).

Renewed attention to these originally valorized public goals of mediation has led some mediation theorists and practitioners, over the last two decades, to reconsider the nature, aim and practice of mediation, and to articulate new approaches to practice, in contrast to the facilitative practices that became, and remain, the conventional approach to mediation.<sup>109</sup> One such approach uses what we call “transformative” practices, but which can be understood more broadly as “party-centered” or “party-driven” practices.<sup>110</sup> Because of the distinguishing features of these practices, a party-centered approach to mediation is highly unlikely to pose significant *risks* to micro-level justice, even when unequal parties are involved. More important, even if this approach to mediation cannot directly achieve macro-level social justice—a

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<sup>109</sup> Indeed, there is now wide recognition that practitioners of mediation not only have different *individual* styles, but follow identifiably different *models* of mediation that involve distinct conceptions of the mediator’s role, goals, and proper practices. See Bush, *supra* note 48, at 981–86. Four of the new approaches alluded to in the text are the transformative, narrative, understanding-based, and insight models. The first is discussed in the text *infra*. Regarding the other three: On narrative mediation, see WINSLADE & MONK, *supra* note 66; Winslade & Monk, *supra* note 57. On the understanding-based model, see GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING, 13–14 (2009). Finally, on the Insight model, see Cheryl R. Picard & Kenneth R. Melchin, *Insight Mediation: A Learning-Centered Mediation Model*, 23 NEG. J. 35 (2007).

<sup>110</sup> See BUSH & FOLGER, *supra* note 11; Robert A. Baruch Bush and Joseph P. Folger, *Transformative Mediation: Core Practices*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK—RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS [hereinafter SOURCEBOOK] 31, 31–50 (Joseph P. Folger et al., eds., 2010). The terms “party-centered” and “party-driven” are suggested by two sources: First, colleagues using transformative practices in ethno-political conflict settings, in searching for a clear way to refer to these practices in their context, found that “party-driven” was the terminology best understood in their context. See Folger & Bush, *Transformative Practice in Ethno-Political Conflict: An Emerging Initiative*, in SOURCEBOOK, *supra*, at 417, 419–20. Second, in discussions with colleagues who teach clinical lawyering skills, the insight emerged that transformative practices in mediation rest on similar theoretical and practical grounds as the approach called “client-centered” lawyering in the legal profession, which similarly stresses the centrality of client choice and control. See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990) (reviewing the development and principles of client-centered lawyering and the reasons for its use). In short, the kinds of practices discussed in the text can be and probably are followed by mediators who do not explicitly label themselves “transformative mediators.” Indeed, part of our intention in using the terminology is to recognize this likelihood. The key is the use of practices that are party-centered and party-driven, like those described in the text and in the sources cited *supra* in this note.

point discussed further in the following section—it can and does achieve the other, civility-related public benefits described above. Therefore, mediation using party-centered practices can be supported in good conscience even by those concerned with social justice, if they also value public civility as an equally or more important goal.

First, some basic information about transformative, party-centered practice in mediation is called for; an extensive explanation is beyond the scope of this article but is available elsewhere.<sup>111</sup> What is unique about this kind of practice, in comparison to both standard facilitative mediation and other modes of practice, is the degree to which this approach places decisionmaking control entirely in the hands of the parties and not the mediator. While the principle of “party self-determination” has been valorized in mediation since the earliest days of the field,<sup>112</sup> the standard practice of mediation nevertheless places a great deal of decisionmaking power in the hands of the mediator. It is conventionally said that “while the parties control the outcome, the mediator controls the process,”<sup>113</sup> and it is

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<sup>111</sup> See BUSH & FOLGER, *supra* note 11. The authors, co-origins of a party-centered approach called “transformative mediation,” explain that:

“[P]arties who come to mediators are looking for . . . more than an efficient way to reach agreements on specific issues. . . . They are looking for a way to change and transform their destructive conflict interaction into a more positive one, to the greatest degree possible, so that they can ‘move on’ with their lives constructively, together or apart. Transformative mediation can thus best be understood as a process of assisting in “conflict transformation”—that is, changing the quality of conflict interaction. In the mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and move forward on a positive footing, with the mediator’s help.”

*Id.* at 49–55. See also Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, in DIVORCE AND FAMILY, *supra* note 98, at 53; Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOT. J. 271 (1999); James R. Antes et al., *Is a Stage Model of Mediation Necessary?*, 16 MEDIATION Q. 287, 291–92 (1999); DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001) [hereinafter DESIGNING MEDIATION].

<sup>112</sup> See Welsh, *Self-Determination*, *supra* note 78, at 3–18; Bush, *supra* note 1, at 718–20 (both articles describing the development of the mediation field and its early valorization of self-determination).

<sup>113</sup> See, e.g., Joseph P. Folger, *Who Owns What in Mediation? Seeing the Link Between Process and Content*, in DESIGNING MEDIATION, *supra* note 111, at 55.

clear from descriptions of best practices in facilitative and other approaches that control of the process is central to the mediator's work in those approaches.<sup>114</sup> The mediator sets and enforces ground rules, shapes definition of the issues, sets the agenda, determines when to move from one stage to the next, and so on. However, it is now recognized that this kind of control over the process inevitably gives the mediator significant influence over the outcome as well. Through shaping the agenda, order, and character of the discussions the mediator can effectively steer the parties away from certain terms of agreement and toward others; and it is clear from research that mediators do just this in conventional facilitative practice.<sup>115</sup> Indeed, as indicated in the discussion of Part III, in the "best practices" of mediator accountability and power balancing, mediators often employ just these kinds of practices to shape and control settlement terms.<sup>116</sup>

These conventional practices not only leave in place serious risks to the goal of social justice, as discussed in Part IV above; they also depart greatly from the principle of self-determination and party decisionmaking—and they therefore undermine the ability of mediation to achieve the public goals of civility and engagement. Parenthetically, the standard practices of mediator process control, which often come to resemble the directive behaviors of arbitrators or small claims judges, may actually discourage public interest in mediation, since it doesn't seem very different from existing forums.<sup>117</sup>

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<sup>114</sup> See Bush, *supra* note 48, at 968–81 (summarizing the literature documenting the prevalence and acceptance of process control in facilitative mediation).

<sup>115</sup> See, e.g., Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y. 7, 11–19 (1986). See also Welsh, *Self-Determination*, *supra* note 78, at 9–15, 23–27 (describing mediator settlement practices in court, and citing research that documents these practices); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 68–75 (1994) (describing how the problem-solving strategies adopted by mediators influence mediation outcomes).

<sup>116</sup> See *supra* Part III.

<sup>117</sup> See, e.g., Stephen K. Erickson & Marvin E. Johnson, *ADR Techniques and Procedures Flowing Through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public*, at 2, <http://www.natlctr4adr.org/docs/MJ-SE-Article-Executive-Summary-REV-9-2010.pdf> (last visited August 11, 2011) (arguing that controlling third-party practices lead some mediation and ADR processes to resemble adjudicatory forums in the ADR consumer's mind). The lack of growth in the private market for mediation—as opposed to mandatory mediation in courts and other institutions—may be the result of this confusion. See Bush, *supra* note 1, at 727–38 (discussing the expansion of mandatory court-connected mediation as the major market for mediation over the last two decades of the field's 40-year history).

By contrast, the most fundamental principle of practice in a party-centered approach is that the mediator's job is "to support, and never supplant, party deliberation and decision-making," on every matter that presents a choice or decision in the mediation process, regarding process or outcome.<sup>118</sup> Basic texts make this principle clear, and it is given great prominence in actual training manuals and programs.<sup>119</sup> In short, practitioners do not take decisions away from parties, do not use interventions that intentionally shape or steer the discussion, and do not substitute their judgment for the parties' on any matter, whether of process or substance. That is, the process is not mediator-driven, but *party-driven*. What mediators do, in this kind of practice, is to *support the parties' own process* of presenting their views, thinking about what is being said (by themselves and each other), and making their own decisions on how to understand the situation, their options, and each other—and ultimately on what if anything they want to do about all of these things. In short, the essential role of the mediator is to *support* the parties' conversation, and their deliberation and decisionmaking, rather than to control, guide, or direct it in any way.<sup>120</sup>

Consider the impact of such an approach to practice—assuming it is followed faithfully<sup>121</sup>—on the social goals, discussed above, that originally inspired many to join the mediation field, as well as on the risks of micro-level injustice in mediation. First, according to clients and researchers, party-centered practices in mediation produce positive impacts directly related to the goal of strengthening public civility as defined above—increasing capacity for self-determination and understanding of others. These positive impacts of mediation are not *transactional* but "*interactional*" in nature; that is, they relate not to the outcome of the mediation but to the character of the

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<sup>118</sup> See Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Theoretical Foundations*, in SOURCEBOOK, *supra* note 110, at 15, 25.

<sup>119</sup> See Bush & Folger, *supra* note 110, at 34–36, 45–48; BUSH & FOLGER, *supra* note 11, at 131–214 (presenting a case study that concretely illustrates how the principle of supporting party deliberation and decisionmaking translates into actual practice); Susan Beale & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in DESIGNING MEDIATION, *supra* note 111, at 9 (describing elements of training programs in transformative, party-centered mediation practice).

<sup>120</sup> See Bush & Folger, *supra* note 110, at 31–50, for a discussion of specific practices that support party deliberation and decisionmaking without controlling it.

<sup>121</sup> There is research evidence that mediators trained in the transformative model do in fact adhere to party-centered practices. See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 400, 425–27 (2001).



discussions themselves. More specifically, party-centered practices support positive changes in the parties' experience of their own competence, their understanding of one another, and the quality of the interaction between them, both during and after the conflict.

To offer a brief explanation of this phenomenon: in most cases, the initial conflict experience itself propels people into an experience of self-inefficacy and mutual hostility, and consequently into a negative and destructive interaction that they find distressing and even disabling.<sup>122</sup> But supportive interventions by a mediator, in a party-driven conversation, can help people to counteract this experience, reasserting and reclaiming their capacities for self-determination and mutual understanding, and consequently returning to a positive and constructive interaction, all of which they value greatly in itself—whether or not this leads to a resolution.<sup>123</sup> These changes are called “transformative” impacts, because of the way the parties' conversation *qualitatively shifts*, from an interaction that is negative and destructive to one that is positive and constructive. Research documents that these interactional impacts are highly valued in themselves by parties to conflict, independent of the outcome of mediation.<sup>124</sup> But the key point for the present discussion is

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<sup>122</sup> See Bush & Folger, *supra* note 118, at 18–24; see generally James A. Antes, *The Experience of Interpersonal Conflict: A Qualitative Study*, in SOURCEBOOK, *supra* note 110, at 125 (documenting the stated effects of involvement in conflict on parties to conflict).

<sup>123</sup> See Bush & Folger, *supra* note 118; Robert A. Baruch Bush, “What Do We Need a Mediator For?”: Mediation's “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 18–21 (1996) (summarizing and referencing studies on “procedural justice” that document parties' valuation of “participation” and “communication” regardless of outcome). In explaining this high valuation, transformative mediation theory argues that the sense of autonomy and connection regained through positive interactional shifts are core aspects of the parties' human identity. Thus, the loss of these in negative conflict is profoundly distressing, and their recapture is deeply desired. See Bush & Folger, *supra* note 118, at 22–24. Interestingly, the same view is expressed by Stulberg, in explaining why he considers the value of self-determination, and practices that support it, the ultimate rationale for mediation as a social process. See Stulberg, *supra* note 89, at 230 (“[A] person's capacity to engage in the process of making such decisions, and to have her choices respected, is essential to her being; one cannot be a person without making such decisions and assuming responsibility for their outcome. Mediation, as a dispute resolution process, incorporates and builds upon party autonomy.”). As noted earlier, Stulberg's vision of mediation was one of the bases for the development of the transformative approach. See *supra* notes 105–109 and accompanying text.

<sup>124</sup> It should be stated clearly, however, that *resolutions are achieved at roughly the same rate* when using transformative practices as when using facilitative practices. See BINGHAM, *supra* note 76; Dorothy J. Della Noce & Hugo C. M. Prein, *The Case for*

that these privately-valued transformative impacts also translate into *public benefits*—in the form of increased capacity of people to participate and collaborate in addressing social problems, and to understand and accept differences and diversity, all of which are core aspects of the important public goal of civility and civic engagement.<sup>125</sup>

To illustrate the point concretely, although at a sub-societal level: in one major workplace conflict program, party-centered mediation practices were intentionally and exclusively employed, precisely because the goal was not merely to resolve specific cases, but to increase the overall civility of the workplace (and therefore improve productivity). That larger goal of improved civility, the program's designers reasoned, would be furthered by helping workers and managers regain the sense of competence and mutual understanding that was damaged when conflicts occurred—and party-centered mediation could help them do this.<sup>126</sup> As one of the program's administrators put it, "Competent, connected people don't hurt each other, they help each other, and mediation builds competency and connection."<sup>127</sup> In effect, through using mediation, conflict would become a "leverage point" for improving the general culture of the workplace: party-directed mediation practices would have transformative impacts, and the resulting interactional changes would not only bring private benefits to the individual workers/managers but achieve the "public benefit" of improved social climate for the overall organization. This specific example concretizes the argument as applied to the larger public sphere: mediation using party-centered practices can build citizen competence and understanding, and these civic capacities support civility at the larger, societal level. This public value, as discussed above, was the original motivation for supporting mediation for many in the field.

As for the continuing concern for avoiding injustice to weaker parties in mediation, the use of party-driven practices like those described above, rather

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*Transformation: A Review of Theoretical and Empirical Support*, in SOURCEBOOK, *supra* note 110, at 93, 94–105.

<sup>125</sup> See BUSH & FOLGER, *supra* note 11, at 78–83.

<sup>126</sup> See BINGHAM, *supra* note 76, at 13–15 (describing these intentions of the founders of the U.S. Postal Service's REDRESS Program, in deciding to use "transformative mediation" exclusively in their workplace mediations); see also Cynthia Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 378 (2001) (offering the comments of the primary founder of the REDRESS program on its intended purpose).

<sup>127</sup> The quoted statement was expressed by the administrator to one of this article's authors in the course of a training program for the administrator's staff.

than conventional practices of mediator control, has surprisingly positive impacts. First, no one is ever pressured by the mediator to accept an agreement in general, or any specific term of agreement; so if a “weaker” party feels for any reason that some aspect of a resolution would be unfair, they are perfectly free to reject it. Indeed, the mediator’s job includes “catching” any expression of hesitancy that may arise, helping parties to express the concerns behind the hesitancy (if they wish to do so), and supporting their decision to proceed or stop. In this way, parties themselves hold the ultimate defense against injustice—the ability to leave when they choose to do so—and that “right of exit” is fully supported by the mediator.<sup>128</sup>

At the same time, the mediator does not “second-guess” the parties’ decisions to accept offers or terms of agreement, or their decisions about how to express themselves to each other, or what to demand or not demand from each other, whether as to substance or process. If an outcome appears “unjust” to the mediator, but that outcome is being accepted by a “weaker” party, the mediator does not force reexamination of the matter in order to “protect” the party from injustice. Similarly, if the discussion between the parties seems “unbalanced” due to what the mediator could see as a power difference between them, the mediator does not intervene to “balance the power” and put the parties on a “level playing field.”<sup>129</sup> What the mediator does instead is to fully support *each* party, both in presenting their views as fully and powerfully as they choose to, and in using whatever manner of expression they choose—rational, emotional, or both.<sup>130</sup> And if parties should choose to refrain from expressing themselves, forcefully or at all, the mediator also supports them wherever they make that choice.

The result of this consistently supportive posture is that “weaker” parties are allowed, and helped, to make the expressive choices that they themselves decide are as effective as possible while still remaining safe. They are helped to make demands for fairness in ways that are culturally resonant for them, but that mediators insensitive to their culture might misunderstand or miss

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<sup>128</sup> See James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 439 (2001) (describing a case example from actual workplace mediation illustrating mediator supporting party decision to leave the mediation session); BUSH & FOLGER, *supra* note 11, at 131–214 (describing a case study illustrating mediator supporting party choice to stay or leave, at several points in the mediation).

<sup>129</sup> See *supra* notes 38–56 and accompanying text.

<sup>130</sup> See BUSH & FOLGER, *supra* note 11, at 131–214 (presenting a case study showing how a mediator offers support of this kind to the parties).

entirely.<sup>131</sup> They are helped to be effective advocates for themselves, on their own terms, and as extensively as they choose. At the same time, they are not urged or induced into making assertions or demands that, while safe in the mediation room, may expose them to risks thereafter—and their own choices as to where safety lies, and thus where to stop pushing the stronger party, are fully respected. In short, to put party-driven practices into the terms of the lion-and-lamb analogy mentioned above<sup>132</sup>: when the lamb chooses to speak quietly to the lion, he is never encouraged to roar instead (or to let someone else roar for him). When he chooses to roar, he has the mediator's full support in roaring, and doing so in his own chosen and familiar "language." When he decides that he cannot get the justice he needs from the lion in mediation, and that it would be better to leave and pursue justice elsewhere, with different tools, he has the mediator's full support in making the choice to leave.

The argument here is this: if mediators consistently use specific practices that fully respect and support party decisionmaking, on both substance *and* process, the risk of micro-level injustice is slight because the sources of those risks are removed. "Weaker" parties are not trapped in a risky process from which they can't leave, in which they can't express themselves fully or effectively, and where they are lulled into a false sense of safety by "protectors" who can't actually protect them once they go home. Rather, they are supported in a process in which they can exercise their own voice to demand justice, their prudence to avoid dangerous provocation, and their freedom to leave if they feel that the process is leading to injustice—and they are accepted as the best judges of what justice is.<sup>133</sup>

Thus party-driven, transformative practices in mediation, all based on and shaped by the fundamental principle of genuinely supporting party choice, are likely to avoid unfair outcomes in individual cases, even when the parties are of unequal power.<sup>134</sup> In sum, mediation need *not* be totally incompatible with social justice. Mediation *can* be used in a way that does

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<sup>131</sup> See *supra* notes 84–86 and accompanying text.

<sup>132</sup> See *supra* note 94 and accompanying text.

<sup>133</sup> See Stulberg, *supra* note 89, at 241–45 (agreeing that party-acceptability, when practices of self-determination have been followed, is ultimately the best guarantor of the "justice" of an agreement).

<sup>134</sup> See BINGHAM, *supra* note 76, at 21, 29 (research documenting perceived fairness of transformative mediation outcomes, by employees as well as managers); Della Noce & Prein, *supra* note 124, at 93–105 (summarizing results of numerous studies documenting perceived outcome fairness in transformative mediations).

not pose serious risks to justice, at least at the micro-level, and party-driven practices in mediation support that possibility.

The above discussion shows how mediation can advance the important public goal of civility and public engagement, *and* it can do so without placing social justice at risk in individual cases—provided it adheres to party-centered, party-driven practices. Therefore, while mediation may not be wholly effective in supporting social justice—in particular at the macro level—it can be practiced in a way that does not put social justice at risk on the micro level, *and* that achieves other important public values. For these reasons, if appropriate practices are used, mediation can be supported in good conscience even by those concerned with social justice, if they also value public civility as an equally or more important goal. In fact, the argument for compatibility goes even further, as discussed in the following section.

### *C. Mediation's Potential: Supporting Sustainable Social Justice Gains*

When mediation follows practices like those discussed in the previous section, an added possibility emerges: the possibility that it can support social justice not only at the micro but the *macro* level. To be very clear: none of the discussion in this article is meant to suggest that mediation is, by itself, a sufficient means of achieving macro-level social justice. Indeed, as Fiss argued and as many social justice advocates agree, the formal legal process and the political process are the arenas most suited to gaining the kinds of aggregate change needed for macro-level social justice.<sup>135</sup>

However, the legal and political processes *themselves* may not be sufficient to achieve *sustainable* social change. Even when “have-not” groups win gains through those processes, the “haves” may be and often are in a position afterwards to vitiate those apparent gains—much as the stronger party in a mediation can undermine the justice produced by power-balancing, as discussed earlier. Perhaps a key reason for this “taking back” of justice gains is the fact that, in the legal and political processes, contending groups rarely change their views of themselves and each other. If anything, those views probably harden. So even when power changes hands through legal and political processes, efforts to take it back can be expected, and they often succeed.

Against this background, mediation may indeed have a useful supportive role to play in the pursuit of social justice, by providing a venue where actual changes in attitudes and perceptions can occur, over time and on a micro-

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<sup>135</sup> See *supra* notes 16–31 and accompanying text; see also Chesler, *supra* note 58.

level, changes that ultimately lay a foundation for more sustainable macro-level change. To explain: party-driven conversations supported (but not directed or controlled) by mediators can and do address questions of *justice per se*, in a unique fashion. In mediation of this kind, parties can and do raise, discuss, and offer challenges to *each other*, in their own chosen modes of discourse, about perceived inequity, power imbalances, and unfairness in the distribution of resources, rights, and obligations.<sup>136</sup> They engage these issues assisted by a third party skilled in supporting, not controlling, communication. People are supported in thinking through the risks they want to take in raising issues of inequity or pushing for justice. They can speak and hear about the dehumanizing effects and consequences of established social structures, and ask *each other* to respond to these concerns. And they can consider the resources and personal will they have, or do not have, to change such structures. All of these social justice concerns—both micro and macro—are addressed through a process that is uniquely and fundamentally defined by a deep commitment to self-determined human dialogue. The results of this kind of supported dialogue, *inclusive of questions of justice*, can be powerful both within and beyond the mediation room.

Support for party-driven dialogue about justice can result in “weaker” parties *claiming justice* on their own, and in “stronger” parties *doing justice* on their own. Indeed, mediators who use party-driven practices offer compelling accounts, from actual cases, of how parties themselves do “justice from below” in this way.<sup>137</sup> The resulting justice and realignment of power, one can argue, is qualitatively different than if it had been achieved by the direction, cajoling, or imposition of an outsider. It is different because it is freely chosen, on all sides, and thus implicates powerful moral dimensions of human agency and connection, on all sides: being protected from injustice by an outsider is very different than making the moral choice

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<sup>136</sup> See Antes et al., *supra* note 128, at 435–52 (presenting numerous case examples in which parties in transformative mediations make just these kinds of challenges involving questions of fairness); see also Stulberg, *supra* note 89, at 215–21 (discussing several examples of how party-driven mediation can best allow such challenges and responses).

<sup>137</sup> See Hyman & Love, *supra* note 38, at 160–61, 188–89 (using this term to describe justice done between the parties themselves in mediation, and giving examples of this phenomenon in specific cases); see also BUSH & FOLGER, *supra* note 11, at 27–31 (giving a case example from the workplace context); Winnie Backlund, *Elder Mediation: Why a Relational Model Works*, in SOURCEBOOK, *supra* note 110, at 307, 315–17 (offering a case example from the elder mediation context); Antes et al., *supra* note 128, at 434–52 (describing multiple case examples from the workplace context).

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to demand justice for oneself. Being forced to do justice by an outsider is very different than making the moral choice to do justice of one's own accord.<sup>138</sup> When parties claim justice and do justice in mediation, by their own choice and without outside direction, the process will almost certainly involve genuine and positive changes in their views of themselves and each other.

At one level, these changes themselves strengthen the public value of civility as discussed above, and it has been argued above that this can be seen as a sufficient reason to continue the use of mediation—with party-centered practices. At another level, however, these changes in viewpoint can help lay a foundation for supporting social justice at the macro level—and in a sustainable way. As argued elsewhere at greater length, there is likelihood that when parties realize and activate their capacities for self-determination and understanding in mediated conversations—itself a very positive, powerful experience—there will be “spillover effects” from that positive experience.<sup>139</sup>

In relation to advancing macro-level social justice, one spillover impact could be that parties of unequal power who have found the strength to make strong justice claims in mediation, and the empathy to be responsive to them, are more likely to act with the same kind of strength and empathy in the future, not only in their private lives but in the public square. It would mean that changed, more positive, views of self and other achieved in mediation would percolate into other situations, including the legal and political arenas where social justice is in contention. The result could be that when justice gains are won in those larger venues, the “have-not” winners are more capable of holding onto those gains, and the “haves” are less inclined to look for ways of reversing them—because the joint impact of changes in rights and power in the larger venues, and changes in attitudes in mediated conversations, would combine to support social justice gains that are sustainable rather than temporary and reversible.

There is as yet no strong evidence to document the occurrence of such spillover impacts from mediation into macro-level social justice, but there are

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<sup>138</sup> See Hyman & Love, *supra* note 38, at 181–84; Stulberg, *supra* note 92 (both articles discussing how parties in mediation can do “justice from below,” which the authors describe as involving just the kinds of moral choices and acts alluded to in the text).

<sup>139</sup> See Bush, *supra* note 58, at 731–34.

some studies that suggest it.<sup>140</sup> If these kinds of effects are possible, then it is also possible that the use of mediation, provided it involves supportive and not directive practices, will not only avoid risks to justice *in* the room but actually contribute to its advancement *beyond* the room. This possibility is certainly worth pursuing, because just as it is true that use of mediation—even with party-centered practices—is not sufficient to achieve macro-level social justice, it may be equally true that legal and political advocacy is not sufficient, by itself, to doing so in a sustainable way. The full picture may be that *all* of these processes are necessary to the task, but none is sufficient by itself. If so, then there is a real incentive to explore the compatibility of mediation with social justice, and with the other processes needed to achieve that goal.

#### *D. Conclusion: First Principles and New Possibilities*

The ultimate conclusion of this discussion is that, depending on how it is practiced, mediation need not be considered incompatible with social justice after all. Rather, mediation can offer a unique opportunity to help preserve and advance social justice while also achieving other very desirable private and public benefits. This by no means suggests that mediation should be regarded as the only or the best means of attaining social justice. Advocacy in other venues, legal and political, are certainly equally important ways of seeking to advance justice. But it does mean that mediation need not be viewed as inimical to social justice, as has long been the case in some quarters. From the examination conducted in this article, it is clear that the reason for the perceived incompatibility of the two is rooted in the departure of mediation practice from the fundamental principles that originally governed it: the principles of party self-determination and human dialogue.<sup>141</sup>

When mediation moved away in practice from these defining principles, it moved away from a unique ability to address issues of social justice. At base, mediation rests on the premise that people have the capacity to make

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<sup>140</sup> See generally BINGHAM, *supra* note 76; Bush, *supra* note 58, at 731–34 (referencing case studies of mediations that appear to have the kinds of upstream effects mentioned in the text).

<sup>141</sup> See Bush, *supra* note 11, at 267–73 (describing the sources of these two fundamental principles in the literature of the mediation field); *supra* text accompanying notes 105–108.



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their own decisions about the issues that confront them, that people can and should assess their own risks, abilities, and limitations in making decisions and addressing issues—including issues that involve power imbalances, inequities and unfairness. When this foundational principle of self-determination is compromised, mediation loses its uniqueness as an instrument for both civility and justice.

The cornerstone premise of party capacity is accompanied by a second one—the assumption that human dialogue is a powerful means for people to find human connection in the face of issues that divide them, precisely because human beings have the capacity for empathy and understanding. Unconstrained, open dialogue has a potentially humanizing effect which brings people to new ways of thinking and deciding—ways that can enable them to make decisions that are based in greater clarity about themselves *and* each other. Dialogue allows people to fully engage each other's humanness—to encounter the intellectual, emotional, symbolic, historical, and physical dimensions of those first perceived as adversaries and opponents. Interactive engagement itself carries with it the potential for profound changes in thinking about and behavior toward others from diverse backgrounds. This premise is central in distinguishing mediation from other approaches to conflict intervention, in which parties' conflict interaction is minimized, controlled, or prevented.

When mediation departs from its commitment to self-determination, it loses the potential to allow people to address issues of social justice through their own deliberation, reflection, creativity, empathy, and grit. Similarly, when mediation loses its commitment to the humanizing power of dialogue, mediators wind up encouraging parties to talk and listen more *to them* than to each other. Mediators become the filter for parties' discussion of their issues. Parties lose the opportunity to experience that they themselves hold the ability and responsibility to change a perceived inequitable or unfair system, structure, or situation.

The examination in this article suggests that, when mediators have difficulty sustaining a commitment to these unique premises of mediation, it is at least in part because they lose their conviction that mediation as a party-driven process can be effective in addressing issues of social justice—issues that matter deeply to them. Paradoxically and sadly, this loss of conviction creates precisely the results that are feared. With the best of intentions, mediators set aside their commitment to the core premises of self-

determination and human dialogue.<sup>142</sup> Instead, they think that to avoid injustice they must control and drive the process; they must power-balance, reframe parties' issues or statements, contain parties' conflict interaction, and diagnose the structural causes of conflict for parties. Yet, all these kinds of interventions actually rob mediation of the potential it offers to support social justice in unique ways, as described throughout this part of the article, by supporting the *parties' own* desires and capacities for demanding and doing justice, in their lives and in the larger world. Equally important, they rob mediation of its potential to strengthen and enhance the civility so badly needed in our fractured civic culture.

While a loss of confidence in the core premises of mediation may have resulted in the failure to realize its potential for supporting both social justice and civility, a return to those core premises, those first principles, can enable mediation and mediators to make a real and unique contribution to the advancement of both of these important social goals, in ways not possible through other conflict resolution processes. Mediators who adhere to consistently party-centered practices, whether in "transformative mediation" or any other approach using these practices,<sup>143</sup> are returning to first principles.<sup>144</sup> In this return, they have found that they are realizing more fully the possibilities mediation offers, not only for achieving other important social aims, but for advancing justice, in and beyond the mediation room—

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<sup>142</sup> See generally Coben, *supra* note 33; Gunning, *supra* note 33 (both authors recommend various practices that dilute the commitment to self-determination, because of a clearly passionate concern for social justice).

<sup>143</sup> As discussed in the notes above, see *supra* note 111, "transformative mediation" is one model of practice designed intentionally as a party-centered, party-driven approach.

<sup>144</sup> See Jody B. Miller, *Choosing to Change: Transitioning to the Transformative Model in a Community Mediation Center*, in SOURCEBOOK, *supra* note 110, at 181, 188–89 *passim* (describing the motivation behind the decision to move the approach of a mediation agency from the facilitative to the transformative model, because of the resonance of the latter with the "values" and "principles" of the staff and volunteers at the agency); Dan Simon, *Transformative Mediation for Divorce: Rising Above the Law and the Settlement*, in SOURCEBOOK, *supra* note 110, at 249 (describing a divorce mediator's "journey" from mediator-centered facilitative practice to party-centered transformative practice, because of his commitment to the values of autonomy and connection); see generally Peter Miller & Robert A. Baruch Bush, *Transformative Mediation and Lawyers: Insights from Practice and Theory*, in SOURCEBOOK, *supra* note 110, at 207 (presenting case studies of an employment mediator's work, together with explanations of how his party-centered, transformative practices reflect his belief in the parties' capacity and motivation for self-determination and mutual recognition).

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*and* they have found clients enthusiastic about their party-centered approach to practice.<sup>145</sup> They have found that, if practiced in accord with first principles, mediation offers opportunities *for* justice, rather than risks *to* justice—and equally important, it offers unique opportunities for strengthening the civility and engagement so essential to the civic health of our society.

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<sup>145</sup> Many of these mediators are our colleagues, and they tell us how their work is enthusiastically received by both individual and organizational clients—family members in conflict, hospital administrators, non-profits helping released prisoners and their families, employers and employees in conflict, and so on. In short, there is a strong market for party-centered mediation, and for those mediators committed to practicing it.

